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ERROR PRESUMED TO BE PREJUDICIAL TILL THE CONTRARY IS SHOWN.

A code was intended to simplify, expedite and unify procedure. Among the code provisions is one to the effect that a decision must be shown on appeal to have been prejudicial to the rights of the party excepting upon some material point, or, to put it in another way, unless the appellate court shall believe that error complained of was committed materially affecting the merits of the question. Forms having been done away with procedure under a code is like that of equity. The material thing required is the statement of facts which, being proven, entitle the pleader to relief either in law or equity. Mere formal matters ought not to stand in the way of justice, yet, in the very face of the provisions of the code, some of our supreme courts have held that error is presumed to be prejudicial unless the contrary is shown. In the case of Smuggler Union Min. Co. v. Broderick, 25 Colo. 16, 71 Am. St. Rep. 106, the court said: "In Deery v. Cray, 5 Wall. 795, in answer to the argument that a judgment should not be reversed when the error works no injury, Mr. Justice Miller, speaking for the court says: 'But whenever the application of this rule is sought, it must appear so clear as to be beyond doubt that the error did not and could not have prejudiced the parties' rights.'" To support this position Smith v. Shoemaker, 17 Wall. 630; Gilmer v. Hyley, 110 U. S. 47; Vicksburg, etc., R. R. Co. v. O'Brien, 118 U. S. 99; Mexia v. Oliver, 148 U. S. 664; and Boston, etc., R. R. v. O'Reilly, 158 U. S. 334, are cited. These decisions are from the United States Supreme Court which employs the forms and traditions of the common law which a code was expressly formed to do away with, in order to better reach the ends of justice.

But this is one of the instances where the common law method of procedure has been permitted to usurp the direct provisions of a code and judicial misconception has taken the place of judicial duty. Missouri is found on both sides of the question. But its later decisions are against the positive direction of the code. R. S. 1899, sec. 865. In the case of Dayharsh v. The Hannibal and St. J. Ry. Co., 103 Mo. 570, *l. c.* 578, the court says the rule on this subject is that error is presumptively prejudicial, and this position is reiterated in 146 Mo. 6, 71 Am. St. Rep. 108, in the case of Smuggler Union Min. Co. v. Broderick. In Iowa the court has consistently followed the code provision. R.S. Iowa 1897, sec. 3601. See Coddy v. Chicago, R. I. & P. Ry. Co., 91 Iowa, 598, where it is held that "where there is error as to an instruction but the evidence is such that had there been a correct instruction and a verdict the other way, it would probably have been set aside for want of support of the evidence, the error as to the instruction will be deemed to have been without prejudice." See also Coates v. Davenport, 9 Ia. 227; Hathaway v. Burlington, C. R. & N. R. Co., 66 N. W. Rep. 892, all of which are against the presumption of prejudice and are in accord with the English interpretation of their code known as the judicature act.

Our attention was recently called by an attorney to a decision which he regarded as error, the decision of the Texas Court of Civil Appeals in the case of Thompson v. Mills, 101 S. W. Rep. 560, where the court said: "Appellant further contends that the general demurrer should have been sustained, on the theory that upon the facts stated in his pleadings he was entitled to damages for breach of contract, whereas he prayed for a sum of money due and unpaid. The proposition furnishes its own answer, for it is well settled that a clear statement of the facts upon which liability is predicated, followed by a general prayer for relief, will, if the facts show a cause of action, be good as against a general demurrer, even if the suit be brought upon a wrong theory." There is no doubt but that under the common law forms the departure in the above case would have been deemed ground for a reversal, yet under the code, which Texas has adopted, the decision is absolutely correct though it does not commend the practice.

The code was intended by its author to follow as near as practicable the equity procedure in which equitable relief will be granted when the facts stated are sufficient under a

prayer for general relief. The code proceeds to grant such relief in common law actions when the facts stated are sufficient for a right to recover. If equity jurisprudence had been developed as it should have been, and was intended to have been, by its author, the practice under a code would have generally been understood. The spirit of the common law has been too deeply imbedded in the American lawyers through the influence of Blackstone and Coke, who were the deities worshipped in the early days of the development of American jurisprudence. But the dawn of a new and better day is at hand for our jurisprudence and we do not think it will be long before new ideals will be taking precedence as in England. Bacon has risen triumphant in the dominance of his views in matters of procedure, just as he prophesied. Some people have raised the question as to the above views being consistent with the philosophy of Hughes' Procedure, which we so strongly commend, but we have no hesitation in pronouncing them as entirely consistent with that work, which is emphatically favorable to a code as contemplated by David Dudley Field and the English judicature act.

NOTES OF IMPORTANT DECISIONS.

BANKRUPTCY—"REASONABLE CAUSE TO BELIEVE" INTENTION TO GIVE PREFERENCE.—One of the most interesting questions which arise under the new Bankruptcy Act is the construction of that clause making voidable preferences which the recipient shall "have reasonable cause to believe" that it was the intention of the bankrupt thereby to give a preference. The point is that facts are sufficient to support an allegation that the recipient of a preference had "reasonable cause to believe," etc. The Supreme Court of Arkansas wrestles with this question in the recent case of Arkansas National Bank v. Sparks, 103 S. W. Rep. 626, where that court held that under the section of the bankrupt act, to which we have just referred, it was not sufficient that the bankrupt may have made an assignment by way of preference, nor that his insolvency and intention to prefer might have been ascertained by the exercise of due diligence on the part of the preferred creditor, but the creditor at the time of receiving the preference must have had knowledge of such facts as afforded it reasonable cause to believe that the assignment was intended to give a preference.

The court's argument is not without considerable interest and profit to attorneys frequently interested in proceedings of this character. The court said: "The question for our determination is whether or not there was a preference, and, if so, whether made under such circumstances as the appellant could, under the law, be required to surrender the notes and refund the money collected in consequence of the assignment thereof. The bankruptcy act provides that 'if a bankrupt shall have given a preference and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee and he may recover the property or its value from such person.' Bankr. Act, July 1, 1898, ch. 541, § 60, subd. 'b,' 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]. It will be observed that this statute differs slightly from the former bankrupt law (1867), in that the former made the right of the trustee to recover depend upon the fact whether or not the person receiving the preference had reasonable cause to believe that the debtor was insolvent; whereas, the present statute makes it depend upon whether or not the creditor had reasonable cause to believe that the preference was intended to be given. For the purposes of this case, however, this distinction is immaterial, and the same principles would control under both statutes.

In Grant v. Nat. Bank, 97 U. S. 80, 24 L. Ed. 971, Mr. Justice Bradley, in delivering the opinion of the court, construing the bankruptcy act of 1867, said: 'Some confusion exists in the cases as to the meaning of the phrase, "having reasonable cause to believe such a person is insolvent." *Dicta* are not wanting which assume that it has the same meaning as if it had read, "having reasonable cause to suspect such a person is insolvent." But the two phrases are distinct in meaning and effect. It is not enough that a creditor has some cause to suspect the insolvency of his debtor; but he may have such a knowledge of facts as to induce a reasonable belief of his debtor's insolvency, in order to invalidate a security taken for his debt. To make mere suspicion a ground of nullity in such a case would render the business transactions of the community altogether too insecure. It was never the intention of the framers of the act to establish any such rule. A man may have many grounds of suspicion that his debtor is in failing circumstances, and yet have no cause for a well grounded belief of the fact. He may be unwilling to trust him further, he may feel anxious about his claim, and have a strong desire to secure it, and yet such belief as the act requires may be wanting.' This statement was quoted approvingly by Mr. Justice Miller in the late case of Barbour v. Priest, 103 U. S. 293, 26 L. Ed. 478. To the same effect, see Collier on Bankruptcy, 459; Off v. Hakes, 142 Fed. Rep. 364, 73 C. C. A. 464; Butler Paper Co. v. Goembel, 143 Fed. Rep. 295, 74 C. C.

A. 430; *In re* Eggert, 102 Fed. Rep. 735, 43 C. C. A. 1; Forbes v. Howe, 102 Mass. 427, 3 Am. Rep. 475; Deland v. Miller & Cheney Bank, 119 Iowa, 368, 93 N. W. Rep. 304. In Stucky v. Masonic Savings Bank, 108 U. S. 74, 2 Sup. Ct. Rep. 219, 27 L. Ed. 640, Mr. Justice Miller, after referring to the case of Grant v. Nat. Bank, *supra*, in commenting on it, said: 'That case establishes the doctrine that a creditor dealing with a debtor whom he may suspect to be in failing circumstances, but of which he has no sufficient evidence, may receive payment or security without violating the bankrupt law. He may be unwilling to trust him further, he may feel anxious about his claim and have a strong desire to secure it, yet such belief as the act requires may be wanting. Obtaining additional security or receiving payment of a debt under such circumstances is not prohibited by law.' Judge Jenkins, in delivering the opinion of the court in the Eggert Case, *supra*, after quoting from the above cited decisions of the Supreme Court of the United States, said: "The resultant of all these decisions we take to be this: That the creditor is not to be charged with knowledge of his debtor's financial condition from mere nonpayment of his debt, or from circumstances which give rise to mere suspicion in his mind of possible insolvency; that it is not essential that the creditor should have actual knowledge of, or belief in, his debtor's insolvency, but that he should have reasonable cause to believe his debtor to be insolvent; that if facts and circumstances with respect to the debtor's financial condition are brought home to him, such as would put an ordinarily prudent man upon inquiry, the creditor is chargeable with knowledge of the facts which such inquiry should reasonably be expected to disclose."

THE APPLICATION OF JUDICIAL REMEDIES IN THE REGULATION OF RAILWAY RATES BY PUBLIC AUTHORITY.

The year 1870 approximately marks the beginning of the railroad problem in the United States as it appears to-day. The great attention which had hitherto been devoted to efforts to procure construction of roads was now diverted into another channel. State governments began to deal with the subject of regulation. The Granger agitation in the western states following the year 1872 was, in part, a popular effort to secure relief against the evils of unchecked discrimination. The litigation which grew out of this legislation established the amenability to public control of *quasi*-public corporations, even to the extent of a regulation of traffic charges, although powers granted under special charters might be affected. The principles laid down in the earlier decisions have been confirmed later.[1]

The benefits and, for the most part, the necessity for government regulation of railroads are conceded even by railway managers. Railroads are, in a sense, public highways. The right of eminent domain can be exercised for a public purpose only; and it has been declared by the Supreme Court of the United States that this public character of the railroads justifies the exercise of the right to take private property, as well as the levying of taxes, to raise funds to aid private companies in railway construction. Railways discharge a public function. Consequently it is the duty of the government, when necessary, to regulate the operations of these corporations. The government has found it necessary to enact legislation for the purpose of controlling interstate commerce and it must enforce such law. The railroads have the power to destroy as well as to upbuild; a power with which the individual cannot cope. It is for the purpose of discharging a governmental function—of providing a means for the adjudication of inevitable conflicts, that regulative measures are sought.

The federal constitution gives to congress the power to regulate commerce among the several states.[2] The power of regulating traffic wholly within states remains with the states. The line of demarcation fixing the bonds of the two sovereignties was clearly drawn by the United States Supreme Court in 1886.[3]

States have incorporated into their constitutions provisions regarding the exercise of eminent domain, the issuance of stocks and bonds, the location of railroads and numerous other subjects. Charters granted by the states have contained similar provisions as well as others in relation to transportation charges, discriminations, land grants and consolidation of roads. The effective regulation, however, has been through legislation establishing commissions. Thirty-four states have commissions. Thirty-three of these bodies have the power to fix rates. But the work of the states is of but very limited value in dealing with the transportation problem in the United States. Distances within the states are, for the most part, insignificant compared with those of interstate traffic. Interstate traffic has been estimated as seventy-five per cent of the total traffic of the country.

The basis of discussion with reference to the question of providing remedies by legislation is simple. It is embodied in three subject heads; the existing evils, the present remedies and the possible remedies. The complaints against railroad operations in the United States to-day, broadly speaking, may be stated as being against excessive rates and discriminations; the latter being generally classified specifically as between articles, with respect to character and quantity,

[1] Munn v. Illinois, 94 U. S. 113; Stone v. Wisconsin, 94 U. S. 181; Winona & St. Peter R. R. Co. v. Blake, 94 U. S. 180; Chicago, Burlington & Quincy R. R. Co. v. Iowa, 94 U. S. 155.

[2] Art. I, Sec. 8, par. 3.

[3] Wabash, St. L. & Pac. Ry. Co. v. Illinois, 118 U. S. 557.

between persons, and between places. A brief discussion of existing legislation will serve to explain suggestions made hereinafter with respect to recourse to the courts for remedies.

The interstate commerce act so-called, became effective in April, 1887.[4] The purpose of this measure, briefly stated, was to secure the publication of rates and the observance of schedules as published, as well as the prevention of rates unreasonable in themselves or relatively unreasonable. Amendments to the act which became effective March 2, 1889, gave the interstate commerce commission, created by the original law, powers to enforce the law, in addition to those primarily conferred.

The first section of the law of 1887 declares that transportation charges shall be "reasonable and just." This provision in regard to rates, which simply states the common law requirement, is also incorporated into the law recently enacted by the fifty-ninth congress enlarging the powers of the interstate commerce commission.[5]

The method employed hitherto to enforce this requirement of the law is rather peculiar. It was formerly the contention of the interstate commerce commission that it had the power to fix rates in place of such charges as it might after investigation declare unlawful. While the power was not directly conferred in the act, the commission argued that it was implied in the provisions embodied in the law which fixed the standard of lawfulness of rates and made it incumbent on the commission to compel compliance with the standard so fixed and to make orders for reparation where the law had been violated.[6]

This contention of the commission having been completely overthrown by the Supreme Court of the United States,[7] the commission was obliged to confine itself to the procedure clearly mapped out in the law. Section 15 of the original statute conferred the power on the commission, after investigation, to order a carrier to "cease and desist" from a violation of the law. Having issued an order against a railroad company to cease and desist from charging a certain rate alleged to be unreasonable, the commission had to resort to the courts for the enforcement of its order. Section 16 of the statute authorized the commission in cases of disobedience to its orders, to apply by petition to the United States Circuit Court which was given power to issue writs of injunction or other process to restrain the further disobedience of a lawful order of the commission. Appeals from the lower courts lay to the Supreme Court of the United States. Such appeals did not suspend the order of the lower court unless a temporary injunction was granted by the court in the exercise of its equity jurisdiction. The recent act of congress, previously referred to, alters this procedure and gives to the interstate commerce commission the power which it has often recommended be conferred upon it. Section 4 of this law amends section 15 of the original act and authorizes the commission, after a hearing on complaint, to prescribe rates to be observed "as the maximum to be charged" in place of such charges as it may condemn as "unjust or unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial," or otherwise in violation of the law. Section 5 of the act which is amendatory of section 16 of the original law as amended March 2, 1889, gives to the commission power to bring an action in the Circuit Court of the United States to enforce its orders and provides that: "If, upon such hearing as the court may determine to be necessary, it appears that the order was regularly made and duly served, and that the carrier is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction, or other process, mandatory or otherwise, to restrain such carrier, its officers, agents, or representatives from further disobedience of such order. * * * "

Section 2 of the law of 1887 forbids discrimination between persons by special rates charged for a "like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions." The recent act of congress prohibits, in more specific terms the giving of special rates and contains penal provisions for the punishment of acts declared illegal.

Section 3 of the act of 1887 prohibits the giving by a common carrier of "any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic" and forbids discrimination between connecting carriers in the matter of affording facilities for interchange of traffic.

The difficulties of enforcing this provison of the law are easily perceived. The act proscribes certain practices, but it does not, as the courts have at various times called attention to,[8] define what constitutes an "undue preference or advantage." Therefore, in the language of the Supreme Court of the United States, "whether there has been an undue or unreasonable prejudice or preference, or whether the circumstances and conditions of the carrirge have been substantially similar or otherwise, are questions of facts, depending on the matter proven in each case."[9]

It may not be difficult in a majority of cases, to determine whether discrimination is practiced;

[4] U. S. Stat. L., vol. 24, p. 379.

[5] Public No. 337, 59th Cong., 1st Sess.

[6] Perry v. Fla. Central & Peninsular R. R. Co., 5 I. C. C. Rep. 97; Murphy, Wasey & Co. v. Wabash R. R. Co., 5 I. C. C. Rep. 122.

[7] Interstate Com. Comm. v. Cincinnati, N. O. & Tex. Pac. Ry. Co., 167 U. S. 479.

[8] Tex. & Pac. Ry. Co. v. Interstate Com. Comm., 162 U. S. 197; Interstate Com. Comm. v. Alabama Midland Ry. Co., 74 Fed. Rep. 715.

[9] Interstate Com. Comm. v. Alabama Midland R. R. Co., 168 U. S. 144.

but the existence of a preference or advantage does not necessarily constitute a violation of law[10] Only such discrimination as is undue or unreasonable under the circumstances presented by each case are forbidden.[11] A preference to be undue must be a preference of a person similarly circumstanced to one against whom discrimination is alleged.[12] When it is considered that competition in various forms,[13] the welfare of different localities,[14] and a seemingly illimitable variety of circumstances are to be taken into consideration in determining the character of a discrimination, it is easy to comprehend that there is little basis for definite action, and to perceive the causes for conflict of opinion between the interstate commerce commission and the courts.

The remedies for the enforcement of section 3 of the act of 1887 are likewise found in sections 15 and 16 of the statute. The commission can order a carrier to "cease and desist" from the practice of a discrimination and can make application to the court for the enforcement of an order; but no rule of conduct is prescribed for the carrier which will compel the abolition of inequalities complained of. Where, however, there is a discrimination between localities, in rates to a common point, such localities being served by different carriers, it appears that the commission is powerless to issue an order at all in regard to such discrimination. The law recently enacted evidently does not add to the powers of the commission in dealing with questions of this character.

Section 4 of the law of 1887 declares it unlawful for a common carrier subject to the provisions of the act to charge a greater compensation "in the aggregate for the transportation of passengers of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance." The interstate commerce commission is authorized, in special cases, to relieve carriers from the operation of this section.

It is evident that were it not for the clause "under substantially similar circumstances and conditions," the enforcement of this section would materially affect railway operations in the United States. The determination of what must be taken into consideration in deciding whether circumstances and conditions under which service is rendered are substantially similar has been the subject of great conflict of opinion between the interstate commerce commission and the courts.

[10] Texas & Pac. Ry. Co. v. Interstate Com. Comm., 162 U. S. 197.

[11] Interstate Com. Comm. v. Alabama Midland Ry. Co., 69 Fed. Rep. 227.

[12] Interstate Com. Comm. v. Baltimore & O. R. R. Co., 43 Fed. Rep. 37.

[13] Texas & Pac. Ry. Co. v. Interstate Com. Comm., 162 U. S. 107; Interstate Com. Comm. v. Alabama Midland Ry. Co., 168 U. S. 167.

[14] Texas & Pac. Ry. Co. v. Interstate Com. Comm., 162 U. S. 197.

In an early case,[15] in an opinion rendered by Judge M. Cooley, the commission stated its construction of the law and laid down rules to which with a slight modification[16] it has adhered in later decisions. But the commission's construction of the law was completely overturned by the Supreme Court of the United States.

Complaint was originally brought before the commission against the Alabama Midland Railway Company and other companies that through rates on traffic going through Troy, Alabama, to Montgomery, fifty-two miles further distant, were higher for the shorter distance to Troy than for the longer distance to Montgomery.[17] The defendants contended that the lower rates to Montgomery were justified by competition between different lines entering the city, which did not affect rates at Troy. The commission refused to sustain this contention and held, in conformity with previous decisions, that competition between carriers subject to the act could not of itself create dissimilarity of circumstances and conditions.

The circuit court[18] and the circuit court of appeals[19] both refused to enforce the order of the commission and, on appeal to the supreme court, that tribunal affirmed the decree of the lower court. Speaking of the effect to be given to competition, the court said:

"The conclusions of the court on this branch of the case are: (1) that competition between rival routes is one of the matters which may be lawfully considered in making rates for interstate commerce; and (2) that substantial dissimilarity of circumstances and conditions may justify common carriers in charging greater compensation for the transportation of like kinds of property for a shorter than for a longer distance over the same line, in such commerce."[20]

It is apparent that for practical purposes the fourth section of the law has been annulled, and therefore it no longer affords a basis for regulation.

Section 11 of the act of 1887, provides for the creation of the interstate commerce commission. In the government of the United States judicial, legislative and executive powers are distinctly separated. Objections may, therefore, well be made to the incompatibility of the functions imposed on the interstate commerce commission, which is authorized to perform various duties which may be described as partly judicial, partly legislative, and partly executive.

[15] *In re* Petition of the Louisville & Nashville R. R. Co., I. C. C. Rep. 31.

[16] Trammel constituting the Railroad Comm. of Georgia v. Clyde Steamship Co., 5 I. C. C. Rep. 324.

[17] Board of Trade of Troy v. Alabama Midland Ry. Co., 6 I. C. C. Rep. 1.

[18] Interstate Com. Comm. v. Alabama Midland Ry. Co., 69 Fed. Rep. 227.

[19] 74 Fed. Rep. 715.

[20] 168 U. S. 145.

Section 6 of the Act to Regulate Commerce authorizes the commission to receive for filing copies of schedules, rates, fares, and charges, and copies of contracts, agreements, or arrangements, entered into by common carriers with each other in relation to any traffic affected by the provisions of the law; to make public proposed advances or reductions in rates, in such manner as may, in its judgment, be deemed practicable; to prescribe from time to time the measure of publicity which common carriers shall give to advances or reductions; and to determine and prescribe the form in which schedules shall be prepared. Section 12, as amended, authorizes the commission to inquire into the management of the business of common carriers and to keep itself informed in regard thereto; and to execute and enforce the law by appropriate means. Section 13 makes it the duty of the commission to investigate complaints, and to call upon the carrier to satisfy them, and, also, to institute inquiries on its own motion. Section 20 authorizes the commission to require annual reports from common carriers and to fix the time and prescribe the manner in which such reports shall be made. Section 21 requires the commission to transmit to congress annual reports containing such information and data collected by it as may be considered of value in the determination of questions connected with the regulation of commerce, together with recommendations in regard to additional legislation. Under the so-called Elkins law[21] the commission is authorized to have instituted proceedings in equity in the federal courts to enjoin the practice of discriminations between localities and to employ a similar procedure to present departures from published schedules. The commission also has certain duties in connection with the enforcement of the law in regard to the use of safety appliances on trains.[22] It has also certain functions under the law relating to the operations of government-aided railroad and telegraph lines,[23] and under the act requiring carriers to make monthly reports of railway accidents.[24] The recent law of congress enlarges the powers of the interstate commerce commission, the most important functions added to its duties being that to prescribe rates to be observed in place of such as it may condemn after hearing on complaint.

An analysis of railway legislation in force in the United States up to the time of the passage of the recently enacted measure revealed three main defects namely: (1) that there was too much delay in the settlement of controversies; (2) that two many duties were imposed on the interstate commerce commission, some of the functions performed being incompatible with each other, and much labor of the commission being wasted under the existing procedure; and (3) that the remedies provided for dealing with cases involving questions of unreasonable rates and discriminations between localities were inadequate.

Even though the expectations of some that through the act of congress enlarging the powers of the interstate commerce commission, giving it the authority to substitute rates in place of those condemned by it, a valuable remedy has been provided for dealing with controversies involving questions of excessive rates, may be realized, the other defects enumerated still inhere in the law. However, the constitutionality of the recent act of congress, enlarging the powers of the interstate commerce commission, has not been determined, and the nature of the results which may be secured from the exercise of these powers is not known.

In connection with the plan to confer rate-making powers on a commission, there must be considered a number of mooted questions of constitutional law. These may be summarized under the following heads: (1) What congress may do in the matter of imposing penalties which will tend to compel obedience by carriers to the orders of a commission. (2) Court review of the orders of the commission. (3) The legality of an act of congress conferring rate-making powers on a commission.

The most important legal phase of the proposition to confer rate-making powers on the commission is, naturally, that concerning the power of congress to regulate transportation charges, embodying the question whether the power to fix rates can be delegated to a commission. The federal constitution provides that all legislative powers shall be vested in a congress;[25] that the executive power shall be vested in a President;[26] and, that the judicial power shall be vested in one supreme court and such other inferior courts as the congress may from time to time ordain and establish.[27] It is a fundamental principle of constitutional law that the functions of these departments of the government cannot be combined. The principle appears distinctly established that congress cannot delegate its legislative authority to any other department of the government. In his work "Constitutional Limitations," Judge Cooley says:

"One of the settled maxims in constitutional law is that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign power of the state has located the authority, there it must remain; and by the constitutional agency alone the laws must be made until the constitution itself is changed."[28]

The constitution confers upon congress the legislative power to regulate commerce among the several states.[29] Whether under this dele-

[21] U. S. Stat. L., Vol. 34, p. 847.
[22] U. S. Stat. L., Vol. 27, p. 531.
[23] U. S. Stat. L., Vol. 25, p. 382.
[24] U. S. Stat. L., Vol. 31, p. 1446.

[25] Art. I, Sec. 1.
[26] Art. II, Sec. 1.
[27] Art. III, Sec. 1.
[28] 7th Ed., p. 163.
[29] Art. I, Sec. 8.

gation of power congress can itself fix rates has never been decided by the supreme court. An excerpt from the opinion of Mr. Justice Harlan in the case of the Northern Securities Company v. The United States, shows that the question is an open one. Discussing the power of congress to regulate commerce, in connection with the question of the constitutionality of the so-called Anti-trust Act, Mr. Justice Harlan said:

"Will it be said that congress can meet such emergencies by prescribing the rates by which interstate carriers shall be governed in the transportation of freight and passengers? If congress has the power to fix such rates—and upon that question we express no opinion—it does not choose to exercise its power in that way or to that extent."[30]

As against the validity of an act conferring rate-making powers on the commission, it may be argued that it is unconstitutional because it would not only delegate legislative power to the commission, but would have the effect of vesting both legislative and judicial powers in a body in which would be commingled numerous incongruous functions to an extent which the courts would hold could not be done. On the other hand, it may be argued, that when congress has fixed a standard requiring that charges for transportation shall be just and reasonable, then the action of a commission in fixing a rate in place of one condemned by it as unreasonable or discriminatory is an administrative act. In the case of Field v. Clark[31] the Supreme Court of the United States passed upon the legality of the tariff act of 1890, in which the President was authorized to suspend by proclamation, the free introduction into the United States of certain products of foreign countries when, in his judgment, the foreign country was imposing on the agricultural and other products of this country, duties "reciprocally unequal or unreasonable." This reciprocity provision of the act was held to be constitutional; the decision of the court being based on the theory that no legislative power was conferred upon the President, who was simply required to execute the law and was to act, as expressed in the opinion of the court, "as the mere agent of the lawmaking department to ascertain and determine the event upon which the expressed will was to take effect." The court adopted the following rule laid down by the Supreme Court of Ohio:[32]

"The true distinction is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made."

[30] 193 U. S. 343.

[31] 143 U. S. 649.

[32] Cincinnati, Wilmington, etc., Ry. Co. v. Commissioners, 1 Ohio St. 88.

It is urged by those who argue that the commission cannot legally be vested with rate-making powers that a declaration by congress that rates shall be just and reasonable, does not afford a sufficiently specific standard to control the action of the commission; that the difficult and extremely important work of fixing rates not only involves discretion in regard to the execution of the law, but in effect prescribes rules of conduct to be observed by carriers.

The decisions[33] of the supreme court in cases involving the question of the powers of state governments to fix rates of transportation and to employ a commission with rate-making powers in the work of regulation and the decisions[34] of the courts dealing with the scope of the power of congress in the regulation of interstate traffic would seem to indicate that the recent act of congress conferring rate-making powers on the interstate commerce commission will be sustained when its constitutionality shall be passed upon. It is not purposed to discuss here the probable holding of the court but simply to observe that the question is an open one. Should the decision be against the legality of the law, it seems apparent that attention will be directed more strongly than it has hitherto been to the possibility of providing satisfactory remedies in the courts for the regulation of traffic charges.

From decisions of the Supreme Court of the United States involving the constitutionality of state laws in relation to the regulation of railway operations it appears definitely settled that the courts have the power to pass upon the question as to whether rates fixed by legislative authority are confiscatory of property rights, and that any law in which it is sought to deprive the courts of such power is unconstitutional. The inhibitions put on the state governments by the fourteenth amendment of the federal constitution are similar to the restrictions which the fifth amendment imposes on the action of the federal government. In the case of Munn v. Illinois, Mr. Justice Waite, discussing in the opinion delivered by him, the power of the legislature to regulate charges imposed by public service corporations, used the following language:

"We know that this is a power which may be abused; but that is no argument against its existence. For protection against abuses by legislatures the people must resort to the polls, not to the courts."[35]

It seems apparent that this statement does not represent the attitude of the supreme court to-day, but, that, as observed before, the courts will on proper application, interfere to prevent

[33] Stone v. Farmers Loan & Trust Co., 116 U. S. 307; Chicago, Milwaukee & St. Paul Ry. Co. v. Minn., 134 U. S. 418; Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362.

[34] Gibbons v. Ogden, 9 Wheat. 1; Northern Securities Co. v. U. S., 193 U. S. 197; Luxton v. North River Bridge Co., 153 U. S. 525.

[35] 94 U. S. 134.

the enforcement of rates fixed by legislative authority, which are "unjust and unreasonable, and such as so work a practical destruction of the rights of property." In the opinion in the case of Reagan v. Farmers' Loan and Trust Company, where it was sought to enjoin the railway commission of the State of Texas from enforcing rates fixed by the commission, Mr. Justice Brewer said:

"The province of the courts is not changed nor the limit of judicial inquiry altered because the legislature instead of the carrier prescribes the rates. The courts are not authorized to revise or change the body of rates imposed by a legislature or by a commission; * * * but still there can be no doubt of their power and duty to inquire whether a body of rates prescribed by a legislature or a commission is unjust and unreasonable, and such as to work a practical destruction to the rights of property, and if found to be so, to restrain its operation."[36]

In reviewing proceedings to test the validity of a ruling of the interstate commerce commission, the United States courts go further than do the English courts, acting under the railway and canal tariff act, which law, does not permit an appeal on a question of fact[37] from the decisions of the commissioners, provided for by that law. It seems logical for the courts to hold that in reviewing an order of the commission the extent of their jurisdiction is the same as in a case in which the adjudication of the question of the reasonableness of a rate is brought before them in the first instance. It is well settled that congress cannot (excluding the special cases provided for in the constitution) impose on the federal courts any duties not strictly judicial.[38] Rate-making has been defined by the supreme court as a legislative function. In the so-called maximum rate case Mr. Justice Brewer used the following language:

"It is one thing to inquire whether the rates which have been charged and collected are reasonable—that is a judicial act; but an entirely different thing to prescribe rates which shall be charged in the future—that is a legislative act."[39]

The question then arises: If the fixing of a rate by the commission is a legislative act, to what extent will the court interfere with such an order when called upon to review it? The courts will pass upon the question as to whether a rate fixed is excessive and will determine whether a rate is so low as to be confiscatory and consequently in violation o the fifth amendment to the federal constitution. It is apparent that between those two limits there is a considerable margin. It may be argued that the adjustment of rates between these two extremes involves questions of policy for the consideration of the carriers or of a regulative body, but which the courts will not in proceedings for review pass upon; and, therefore, as they do not go into the question as to whether a rate fixed by the commission will yield a fair return on property invested, they cannot interfere with an order of the commission, which in its practical effect, may deprive the carrier of property by making it impossible to put such property to a profitable use. However, as the courts will, on proper application, interfere to prevent the enforcement of rates fixed by legislative authority which are "unjust and unreasonable, and such as to work a practical destruction to the rights of property," and as they have shown a tendency to extend their equity jurisdiction in these cases, it seems not unlikely that their ultimate decision will be that the enforcement of a rate which would have the effect of preventing the carrier from obtaining a fair return on its property is equivalent to a deprivation of property rights and, consequently, tantamount to a taking of property without due process of law, within the meaning of the fifth amendment to the constitution.

In the case of Smyth v. Ames the supreme court defined, to some extent, what in its opinion, constitutes a reasonable rate. Speaking for the court, Mr. Justice Harlan said:

"We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth."[40]

This language, defining what in the opinion of the court constitutes the standard of reasonableness of rates, would seem to be idle if, in cases involving the question of the legality of rates fixed by the legislative authority, the court were called upon to pass solely on the question as to whether such rates were confiscatory, and had not jurisdiction to interfere if the rates afforded any com-

[36] 154 U. S. 397.

[38] 51 & 52 Vict., ch. 25, 17.

[38] U. S. v. Ferreira, 13 How. 40; Hayburn's Case, 2 Dall. 409; Interstate Com. Comm. v. Brimson, 154 U. S. 447.

[39] Interstate Com. Comm. v. Cincinnati, N. O. & Texas Pac. Ry. Co., 167 U. S. 499.

[40] 169 U. S. 546-547.

pensation at all. In an action at law involving the question of an excessive rate, it is incumbent on the courts to determine what is a reasonable charge for the service performed by the carrier, and it seems that they should go into this question in equity proceedings to review an order of the commission.

A review of an order of the interstate commerce commission must be secured by an application to the court in an original proceeding to test the lawfulness of such order. An appeal, technically speaking, cannot be taken from a commission or administrative board to a court.[41] The action in which a review of the order of the commission is secured being an original proceeding in equity, it seems that the consideration of the court cannot by legislative enactment be limited to the evidence taken before the commission.[42]

If the question of the lawfulness of rates charged by carriers must ultimately come before the courts in an original proceeding, even though the commission is in the first instance called upon to examine into a case, and if the decision of a commission will be annulled if in the opinion of the court a proper charge has not been determined upon by such commission, then it would appear that the settlement of controversies would be greatly expedited by application to the courts directly, without recourse to a commission, provided remedies in the courts were afforded for dealing with different cases involving the unlawfulness of rates as defined by law. Important cases will be appealed to the courts. The findings of the commission are *prima facie* evidence before the court and they are of value in that as the results of the investigations of an expert body they are of material assistance to the court.

However, there can be suggested important advantages of submitting controversies directly to the courts provided it be possible to afford adequate remedies. As observed before, the settlement of cases would be expedited and, further, the services of a semi-judicial body, exercising incongruous functions, could be dispensed with. The commission, stripped of functions which may for convenience be termed partly judicial and partly legislative, would assume the form of those bodies, which, in the classification of state commissions, have been termed advisory commissions, of which the Massachusetts commission is a good type. Such a commission could then with greater propriety, and under much more favorable circumstances, discharge the administrative functions which are imposed upon the present commission. For the interstate commerce commission has performed valuable services in conducting investigations into railway operations, in collecting important statistical data, and in acting as arbitrators and conciliators.

It is interesting to note, that although much attention has been given to the development of the commission plan of regulation of railway operations, and although the enlargement of the powers of the interstate commerce commission has been strongly urged, recourse has been made to the courts in various ways, where existing legislation has proved inefficient. The criminal provisions of the Act to Regulate Commerce having proven inadequate for the prevention of discrimination by special rates, the interstate commerce commission conceived that possibly a remedy might be afforded by securing orders from the courts to restrain carriers from departing from published rates. Although the original act contained no provisions for the procedure, application for injunctions against a number of railroad companies was made to the federal courts at Kansas City and Chicago. Although some doubt was felt as to whether the remedy would lie, a preliminary injunction was granted in March, 1902.

The following year the Elkins Law, making especial provision for this equity procedure, became effective. Section 3 of this act contains the following provision:

"That whenever the interstate commerce commission shall have reasonable ground for belief that any common carrier is engaged in the carriage of passengers or freight traffic between given points at less than the published rates on file, or is committing any discrimination forbidden by law, a petition may be presented alleging such facts to the circuit court of the United States sitting in equity having jurisdiction; and when the act complained of is alleged to have been committed or as being committed in part in more than one judicial district or state, it may be dealt with, inquired of, tried, and determined in either judicial district or state, whereupon it shall be the duty of the court summarily to inquire into the circumstances, upon such notice and in such manner as the court shall direct and without the formal pleadings applicable to ordinary suits in equity and to make such other persons or corporations parties thereto as the court may deem necessary, and upon being satisfied of the truth of the allegations of said petition said court shall enforce an observance of the published tariff or direct and require a discontinuance of such discrimination by proper orders, writs, and process, which said orders, writs, and process may be enforceable as well against the parties interested in the traffic as against the carrier, subject to the right of appeal as now provided by law."

The several district attorneys of the United States are charged with the duty of instituting and prosecuting the proceedings provided for by the act, whenever the attorney-general shall direct, either of his own motion or upon request of the interstate commerce commission. Thus, in proceed-

[41] Murray's Lessee v. Hoboken Co., 18 How. 272; U. S. v. Ferreira, 13 How. 40; Interstate Com. Comm. v. Brimson, 154 U. S. 447.

[42] Texas & Pac. Ry. Co. v. Interstate Com. Comm., 162 U. S. 239.

ings in equity, the courts in effect issue orders to carriers to cease and desist from paying rebates, just as the interstate commerce commission has issued orders to the same effect. Persons against whom an order of court may have been directed, by a violation of the law, are liable not only for transgression of the provisions of the statute, but also for contempt of the process of the court.

It has been urged that some amendments to this law, making it definitely applicable to the various devices for giving rebates are desirable. As the law now forbids the transportation of property at less than published rates, by "any device whatever," it seems that attempts to make it more specific in this regard would probably weaken rather than strengthen it. This view appears to be confirmed by a recent decision of the Supreme Court of the United States affirming the decree of the circuit court for the western district of Virginia enjoining the Chesapeake and Ohio Railway Company from delivering coal to the New York, New Haven and Hartford Railway Company at a price not sufficient to pay the cost of the coal at the mines, as well as the expense of delivery, including the published freight rate. The following excerpt from the opinion of the court, delivered by Mr. Justice White, shows the attitude of the court with reference to the question of the application of the existing law to different circumstances:

"Because no express prohibition against a carrier who engages in interstate commerce becoming a dealer in commodities moving in such commerce is found in the act, it does not follow that the provisions which are expressed in that act should not be applied and be given their lawful effect. Even, therefore, if the result of applying the prohibitions as we have interpreted them will be practically to render it difficult, if not impossible, for a carrier to deal in commodities, this affords no ground for relieving us of the plain duty of enforcing the provisions of the statute as they exist. This conclusion follows, since the power of congress to subject every carrier engaging in interstate commerce to the regulations which it has adopted is undoubted."[43]

It seems apparent that a discrimination in rates between localities cannot be prevented against the will of a carrier, unless a regulative body has the power to fix absolute rates. The interstate commerce commission has, at different times, stated in its reports[44] that even the power to fix maximum rates would not afford an adequate remedy in dealing in cases of this kind, and cases[45] dealt with by the commission afford practical illustrations showing the truth of these statements. While it may be competent in a court of law, in a case involving a complaint that a certain rate or a number of rates are excessive, to introduce evidence in regard to charges collected for a similar service on other lines, and while the reduction of a rate predicated in whole or in part on such evidence, may have the effect of eliminating, at least to some extent, a discrimination against a certain locality, the power to fix a maximum rate is, generally speaking, a remedy applicable to no other purpose than that of the correction of an excess rate. The removal of a discrimination between localities, such discrimination being caused either by the adjustment of rates made by different independent carriers over lines running from competing cities to a common point, or by the adjustment of rates on lines of a single carrier, cannot be effected against the will of the carriers without the power to fix minimum as well as maximum rates; as a discrimination may be continued by the lowering of rates on one line in order to preserve the relative adjustment producing the inequality complained of.

The interstate commerce commission having found itself unable to deal satisfactorily under the law with the subject of discriminations between localities, again resorted to the courts. The application of the injunction remedy to cases of this character had also been tried. Complaint having been made that a higher rate from St. Louis to Wichita, Kan., than that in force from St. Louis to Omaha, resulted in discrimination, suit was brought in the name of the United States, in the United States Circuit Court for the District of Kansas, to restrain the carrier from continuing to exact a greater rate for transportation of freight between Wichita and St. Louis than that charged between St. Louis and Omaha.[46] The case having been appealed to the supreme court,[47] Mr. Justice White rendered an opinion in which it was held that prior to the passage of the Elkins law the district attorneys of the United States, acting under the direction of the attorney general, in pursuance of a request of the interstate commerce commission, had not the power to institute a proceeding against a railroad corporation to restrain it from discriminating in its rates between different localities, and that, therefore, the demurrer filed in the lower court to the bill against the railroad company should have been sustained. It was further held that as the Elkins law, which made provision for the procedure which had been tried, was applicable to pending cases, the case could not be finally disposed of, and was, therefore, remanded to the circuit court for further proceedings in conformity with the law. Even though the court should finally decide that an injunction will lie in a case of this character, it is evident that the important question is, whether it will go to the extent of enjoining the collection of a rate in excess of certain

[43] N. Y., New Haven & Hartford R. R. Co. v. Interstate Com. Comm.; The Interstate Com. Comm. v. Chesapeake & Ohio Ry. Co., 200 U. S. 399.

[44] Annual Report, Vol. 11, p. 23, *Ibid.* 12-27.

[45] Eau Claire Board of Trade v. Ry. Co., 5 I. C. C. Rep. 264; Savannah Bureau of Freight & Transportation v. Charleston & Savannah Ry. Co., 7 I. C. C. Rep. 458.

[46] U. S. v. Mo. Pac. Ry. Co., 65 Fed. Rep. 903.

[47] Mo. Pac. Ry. Co. v. U. S., 189 U. S. 274.

figure; for, while the determination of the reasonableness of a rate is a judicial question, the courts have repeatedly said that the fixing of a rate for the future is a legislative function. If the courts can merely issue an injunction against the practice of a discrimination and yet cannot say what readjustment of rates must be made to abolish the discrimination, it appears that its order cannot have any considerable efficacy. And yet, the interstate commerce commission can issue no more definite order than this, even under the new law enlarging its powers; it can simply order carriers to "cease and desist" from discriminating in rates between localities; for, as observed before, it is apparent that the power to fix a maximum rate is, generally speaking, a remedy applicable to no other purpose than that of the correction of an excessive rate, and does not confer authority to adjust rates with relation to one another. Leaving aside for the time the question of the probable holding of the court on this question of enjoining the practice of discrimination in rates between localities, it is interesting to contemplate the possibility of extending to cases involving questions of excessive rates, this equity procedure, which has been successfully employed in dealing with rebates and which it has been sought to apply to controversies arising out of alleged unlawful discrimination between localities. The requirements of the law being that rates shall be reasonable, it would seem that provision could be made by statute that in a case in which a charge might be complained of as excessive an action could be instituted in the name of the United States to require the court to determine what should be the maximum rate to be charged; in other words, to make a finding as to what would be a reasonable rate to be charged in conformity with the law. As the court would simply be required to make a finding of fact and not to make any order in the premises, it would appear that the carrier would be under no legal obligations to put into effect the rate which the court determined upon as a reasonable charge. However, it appears that the rate so determined could by statute be made the lawful rate for the future. Under a procedure of this character the court would not indirectly be discharging a legislative function of rate-making; that being done by the legislative authority. It also appears that an action to enjoin the collection of an alleged excessive rate would be a proper proceeding in equity and that the court should, on proper application, go further and enjoin the charging of any sum in excess of what it might find to be reasonable. An order of court, so granted on the application of an individual, would apparently be binding on such parties only as were before the court. Further, it would seem that if conditions upon which the court predicated its action should change, the carrier would be relieved from the obligation of the injunction. Under such circumstances the carrier would apparently either have to apply for a modification of the decree of the court or act upon such changed conditions and by proof thereof escape from being adjudged in contempt of court. However, it seems probable that a court of equity in making an order would attach conditions thereto providing for a change if, subsequent to the rendition of the decree, grounds for a change in the rates, growing out of the changed conditions, could be shown; although the question suggests itself: If the decree made provision for changes under changed conditions, might such decree not be objectionable as involving an attempt of judicial authority to fix rates for the future? It seems that a safe way to avoid any difficulty in the procedure outlined would be to provide by statute that the finding of the court should be binding on the carrier in the future for a certain period of time; or if it should be thought that a provision of this nature would be productive of too much rigidity in rates, it could be provided that the finding of the court should be binding in the future so long as the same conditions should continue as had been shown by evidence in the case.

It seems evident that cases involving questions of discrimination in rates and of excessive charges afford proper grounds for equity jurisdiction, and that common law remedies are inadequate in dealing with them. Although a federal statute reasserts the common law requirement as to rates, it appears that common law remedies cannot be resorted to in the United States when interstate rates are complained of.[48] But, supposing the common law remedy to be available; the shipper may pay the sum demanded and then sue for the overcharge, or he may refuse to pay, offer what he considers a reasonable charge for the services performed, and then replevin the property. It is clear that this remedy is of little value. It cannot be availed of without much delay and expense. Numerous small shipments are made in which the amounts involved would not warrant the institution of lawsuits. Although defeated in an action of this character, the carrier would be under no legal obligation to reduce its charges in the future. In a large number of instances the middleman, who is the shipper, and as such, has the right to sue, suffers less from the payment of an excessive rate than do the consumer and producer. The remedy cannot be availed of by the

[48] In an opinion rendered by Mr. Justice White, February 25, 1907, the United States Supreme Court held, in the case of the Texas Pac. Ry. Co. v. The Abilene Oil Co., that the courts have not the power to grant relief on complaint of a shipper, without previous action by the Interstate Commerce Commission. The suggestion made here in regard to a procedure in the courts for dealing with cases involving controversies in regard to the lawfulness of rates is, of course, based on the hypothesis that the action of the court would not be in conflict with any statute. Up to the time of this decision it seems to have been the general opinion that the courts were not prevented from taking action independently of previous action by the commission.

consumer who may suffer because of increased prices brought about by excessive transportation charges. An adequate remedy must provide a means of compelling carriers to make reasonable rates for the future to be charged the public. In order, therefore, to avoid the multiplicity of suits, which in connection with other matters makes the remedy at law inadequate, it seems that equitable remedies may properly be resorted to. Equity has jurisdiction where an adequate remedy at law cannot be had. In an early case[49] the Supreme Court of the United States laid down the following rule, which has later been affirmed:[50] "It is not enough that there is a remedy at law, it must be plain and adequate, or, in other words, as practical and as efficient to the ends of justice and its prompt administration, as the remedy in equity."

Equity jurisdiction will be sustained where the remedy at law will not be so efficient as the remedy in equity and the proceeding in equity will save time, expense, and a multiplicity of suits, and settle finally rights of all concerned in one litigation.[51] It has been said that inadequacy of law justifying interference of equity consists in the fact that law in its nature or character is not fitted or adapted to the end in view.[52] Equity has been sustained on the ground that the remedy at law would be cumbersome or inconvenient and, therefore, inadequate.[53]

As observed before, the Elkins law contains a provision for the injunction remedy in cases involving the question of discrimination between localities. Unless the power of adjusting rates with relation to one another can be conferred upon the courts and exercised effectively by them, it seems that the government is powerless to enforce one of the most important provisions of its legislation to regulate railroad operations. The power to adjust rates in this manner has not been conferred upon the interstate commerce commission. Whether such a grant of authority to the commission would be upheld by the Supreme Court of the United States is uncertain.

In the case of the Missouri Pacific Railway Company v. United States, Mr. Justice Brewer, with whom concurred Mr. Justice Harlan, dissented from the opinion of the court rendered by Mr. Justice White, in which it was held that prior to the enactment of the Elkins law the district attorneys of the United States, acting under the direction of the attorney general, in pursuance of the request of the interstate commerce commission, had not the power to institute a proceeding against a railroad corporation to restrain it from discriminating in its rates between different localities, but that as the Elkins law, which made provision for the procedure which had been tried, was applicable to pending cases, the case could not be finally disposed of, and was, therefore, remanded to the circuit court for further proceedings in conformity with the law. In a dissenting opinion in which the view was set forth that such an action was a proper proceeding even prior to the enactment of the Elkins law, Mr. Justice Brewer, after quoting an excerpt from the opinion of the court in the case of the Interstate Commerce Commission v. Baltimore & Ohio R R., 145 U. S. 963, 175, in which is discussed the principles governing the regulation of railway traffic in the United States prior to the enactment of the Inter-Commerce Act, said: "But beyond this the interstate commerce act itself forbids unjust discrimination, and such discrimination is also clearly and fully set forth in the bill. Can it be that the government is powerless to compel carriers to discharge their statutory duties?"[54]

It is suggested that the Elkins law, making provision for suits to be brought in the name of the United States under the direction of the attorney-general, to enjoin discrimination by special rates and discrimination between localities, may possibly be amplified so that an effective judicial remedy may also be provided for dealing with cases involving the question of excessive charges. While it would seem that cases involving questions of discrimination in rates and of excessive charges afford proper grounds for equity jurisdiction, and while the procedure outlined may appear to offer effective remedies for dealing with such controversies, the question then arises, as to whether a law containing the provisions suggested could in effect seek to impose upon the courts powers which they could not properly exercise.

As observed before, it is well settled that congress may not impose on the federal courts any duties not strictly judicial.[55] Rate-making has been defined by the Supreme Court of the United States as a legislative function.[56] But it would appear that in making a finding of fact as to what is a reasonable and just rate in a given case, or, in enjoining the charging of a part of a rate complained of as excessive or discriminatory, the court would not be exercising nonjudicial functions, but would be performing the judicial function of determining rights of parties in a controversy properly one to be dealt with by the courts.

In June, 1870, congress passed an act authorizing the International Bridge Company to construct and maintain a bridge across the Niagara River, subject, however, to several conditions; of which some related to the location of the structure and the supervision of the work by the secretary of war. It was further provided by the

[49] Boyce's Executors v. Grundy, 3 Pet. 210.
[50] Rich v. Braxton, 158 U. S. 406.
[51] Oelrichs v. Williams, 15 Wall. 211.
[52] Thompson v. Allen County, 115 U. S. 554.
[53] Boyd v. Carbon Co., 182 Pa. St. 206.
[54] 189 U. S. 290.
[55] Interstate Com. Comm. v. Brimson, 154 U. S. 447; U. S. v. Ferreira, 13 How. 40; Hayburn's Case, 5 Dall. 409.
[56] Reagan v. Farmers' Loan & Trust Co., 154 U. S. 397; Interstate Com. Comm. v. Cincinnati, N. O. & Texas Pac. Ry. Co., 167 U. S. 479.

act as follows: "All railway companies desiring to use the said bridge shall have and be entitled to equal rights and privileges in the passage of the same, and in the use of the machinery and fixtures thereof, and of all the approaches thereto, under and upon such terms and conditions as shall be prescribed by the district court of the United States for the northern district of New York, upon hearing the allegations and proofs of the parties, in case they shall not agree."

The bridge company and the Canada Southern Railway Company being unable to agree as to the tolls which should be paid by the latter for the use of the bridge, the railroad company, relying on the provisions of this act, applied to the court to prescribe the terms and conditions upon which it might be entitled to use the bridge.[57]

It was argued that the act of congress was not purposed to confer power on the court to prescribe compensation which the bridge company might charge for use of the property; and, that, were it intended to confer the power, the act would be unconstitutional, as such power partakes of a legislative rather than a judicial character, and, therefore, could not be delegated by congress to the court. The court decided that the act was not intended to, and did not, confer jurisdiction upon the court to decide what compensation the bridge company might charge the railroad company for the use of the bridge but discussed the question as to whethar such power might legally be conferred. Referring to the contention that the power to fix tolls is a legislative power, the court said (p. 193): "Neither can the constitutionality of the act be successfully assailed upon the theory that the power to fix tolls is a legislative power which cannot be delegated. Concededly congress could not delegate its legislative powers or confer authority upon this court to exercise any but judicial functions; but the act can be upheld as one which devolves the merely judicial function upon the court to determine the rights of parties when they may be brought into controversy after congress has created and defined the right. If the act provides for a determination of the terms and conditions upon which the railway companies may use the bridge in case parties fail to agree, inasmuch as this determination is committed by the act to a judicial tribunal upon hearing the proofs and allegations of the parties, the inference is cogent that the tribunal is to proceed according to the settled principles which control judicial action; it is not to exercise an arbitrary discretion but a judicial discretion. * * *"

The fact that a judicial decision is sought to protect the existence of a right in the future does not deprive the court of jurisdiction. In other words, judicial determination is not confined to the past. In discussing this point, Judge Wallace used the following language (p. 193): "It is no less the exercise of judicial functions to prescribe a rule of future conduct, or protect the existence of a right in the future, than it is to determine whether a right has been invaded in the past. It is one of the prominent offices of courts of equity to do this. While there are intrinsic difficulties of a grave nature in dealing with such a question of fact as would require to be decided, the inquiry after all would only be what would be reasonable compensation to the bridge company for the use of their property."

In 1897 the legislature of the state of Massachusetts passed a law[58] providing as follows: "The selectmen of the town, or any persons deeming themselves aggrieved by the price charged for water by anysuch company, may, in the year eighteen hundred and ninety-eight and every fifth year thereafter, apply by petition to the supreme judicial court, asking to have the rate fixed at a reasonable sum measured by the standard above specified; and two or more judges of said court, after eharing the par ies, shall establish such maximum rates as said court shall deem proper, and said maximum rates shall be binding upon said water company until the same shall be revised, or altered by said court pursuant to this act."

In the case[59] in which Wiliam T. Janvrin and others, selectmen of the town of Revere, made application to the court under this law to fix the rate charged by a water company for water supplied to the inhabitants of the town, at a reasonable charge, Mr. Chief Justice Holmes, of the Supreme Court of Massachusetts, in the opinion delvered by him said (p. 517): "It is within the relations between actual water takers and the companies that the statute calls on this court to deal. It does not undertake merely to make the court a commission to determine what rule shall govern people who are not yet in relation to each other, and who may elect to enter or not to enter into relations, as they may or may not like the rule which we lay down; it calls on us to fix the extent of strictly existing rights. With regards to such rights judicial determinations are not confined to the past."

It has been repeatedly held by the courts that the question of the reasonableness of a rate is one for judicial investigation. It is one into which the courts are called upon to examine in actions at law when complaint is made by a shipper against the charge of an alleged excessive rate, or, as stated by Mr. Justice Brewer in the case of Reagan v. Farmers' Loan & Trust Company, "to inquire whether a body of rates prescribed by a legislature or a commission is unjust and unreasonable, and such as to work a practical destruction to the rights of property." Said Mr. Chief Justice Holmes in the Janvrin case (p. 517-518): "But it has been regarded as competent for a court to pass on the reasonableness of a rate even when established by the legislature, to the extent of declaring it unreasonably low. (Citing a number of cases). *A fortiori*, when the rate is estab-

[57] Canada Southern Ry. Co. v. International Bridge Co., 8 Fed. Rep. 190.

[58] St. 1897, Ch. 336, Sec. 1.

[59] 174 Mass. 514.

lished by the company and it has undertaken to charge the plaintiff a sum which he alleges to be unreasonable, and the legislature in terms has referred him to this court, the court has jurisdiction to inquire into the matter and to award the plaintiff any amount exacted from him in excess of a reasonable rate. (Citing Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 397): It is true that in Reagan v. Farmers' Loan & Trust Company it is said that 'it is not the function of the courts to establish a schedule of rates,' 154 U. S. 400; and to that proposition we fully agreed. But it will be observed that the proposition is laid down in connection with the statement that 'the challenge in this case is of the tariff as a whole, and not of any particular rate upon any single class of goods.' Probably to prepare a new schedule. or to rearrange the old one, would have gone beyond the scope of the rights immediately affected or threatened in the case befor the court, into the realm of abstract law making for the future, and so beyond the power of the court; and, if it had not been beyond the court's power, still very possibly it might have been refused in the court's discretion, the court leaving the proper body to undertake that. But it is implied that if the challenge had been of a single rate threatened to be charged for a service demanded, the court might have determined the question between the parties for the immediate future, as it is stated three pages earlier that the court would determine it with regard to a charge for past services. When you are prepared to say that a given charge is too high or too low, it hardly would be consistent to say that you had not power or ability to say what is a proper charge."

In the case of Canada Southern Railway Company v. International Bridge Company, previously referred to, Judge Wallace said (p. 194): "Ordinarily it is the legislative department that prescribes the tolls which may be charged in the enjoyment of a franchise, and this is usually done by fixing a maximum beyond which the grantee cannot go." And further (p. 194): "It is sometimes, however, a judicial duty to determine what are reasonable tolls." * * * "Assuming that congress intended to confer upon this court authority to prescribe the compensation which the bridge company might charge for the use of their property, no doubt is entertained of the constitutionality of the act." (p. 192).

While in the Janvrin case the court called attention to the fact that it did not decide that the rate so fixed would be binding on others before the court, the decision seems to indicate the opinion that a law might be framed to provide that the rate fixed by the court should be the general rate, and that a proceeding by injunction would be a proper remedy to effect this purpose. The following excerpts from the decision indicate the view taken: "But as it is not likely that a rate thus established for a given moment after full investigation would be departed from upon the application of a second person similarly circumstanced, it may be questioned whether there is anything to prevent the legislature from sanctioning without further hearing a rate which has once been declared judicially to be reasonable." (p. 518).

"It will be understood from the reasoning on which we sustain the act that the court would not regard itself as warranted or called upon to undertake the fixing of rates execept so far as they concern interests actually and legitimately before the court."

"The liberty to apply to this court is confined to the year 1898, and every fifth year thereafter, so that seemingly it is contemplated that the rate when fixed will remain unchanged for five years. This is another indication that the legislature had its attention directed to the establishment of a general rate. But supposing a party aggrieved should obtain an injunction, obviously the decree would be drawn in the common form, subject to review on change of circumstances, the court would not be likely to grant leave to file a review until a reasonable time had elapsed, and if the legislature should say that in these cases five years was a reasonable time, we could not say that it was wrong. It is true that the party aggrieved is not given an injunction in terms by the act, and in this is another peculiarity in the procedure, looking as it does to a decree affecting the future. Of course, it is assumed and no doubt rightly, that a company would not venture to disregard the decree. But, if a company should prove recalcitrant, in case such disregard should not be construed as *ipso facto* contempt, undoubtedly the decree should not be enforced by injunction." (p. 519).

"If it legitimately might be left to this court to decide whether a bill for water furnished was reasonable, and, if not, to cut it down to a reasonable sum, it equally may be left to the court to enjoin a company from charging more than a reasonable sum in the immediate future." (p. 517).

The Elkins law makes provision for an injunction to be issued by the court against a discrimination by rebates and in rates between localities. It seems not improbable that a constitutional law could be framed extending this procedure to cases involving questions of excessive rates; empowering the court in an action brought in the name of the United States to enjoin the charging of any sum in excess of what it might find to be a reasonable rate; and that the provision for dealing with discriminations between localities could be made more specific so as to enjoin the charging of a discriminatory rate above the sum charged a more favored locality; the injunction to continue in force so long as the same conditions should continue as had been shown by the evidence in the case, and the rates so determined to be the maximum rates to be charged the public. Another form of discrimination in railroad operations is that growing out of the inequality in the distribution of facilities for transportation. It has been shown that the courts are competent to

deal effectively with questions of this kind. In the case of the United States v. West Virginia Railroad Company,[60] the relator, a corporation engaged in the mining and shipping of coal in West Virginia, charged in its petition for a writ of *mandamus* that the respondent railroad company discriminated in the transportation of coal in favor of two other coal companies, making an unjust allotment of cars among the three companies, and prayed that the Kingwood Company be decreed to be entitled to 33 1-3 per cent of the total car supply furnished by the West Virginia Northern Railroad Company to the coal mines located along its line.

The court having ascertained the facts in regard to the method of distribution, discussed what constitutes a proper basis for distribution, formulated a rule to govern the distribution of cars in conformity with section 3 of the interstate commerce law, and, applying this law to the facts in the case, held that the Kingwood Coal Company had not been allowed a fair percentage of cars; that the company was entitled to at least 31 per cent. of the present distribution instead of 18 per cent., which it has been receiving; and that a writ might issue requiring the defendant company to cease giving preference to the other coal companies and to distribute cars in such manner as the court had found to be proper.

Attention has been called within the narrow limits to which this discussion has been confined, to some of the well known causes which have given rise to complaints against railroad operations, and which have been productive of the controversies for which remedies are demanded. It has been sought to analyze briefly the existing legislation in relation to interstate commerce; to point out the remedies provided by it, that it is as yet tentative in its character, and that there is a possibility that one of its most salient provisions will be declared unconstitutional by the supreme court when that tribunal is called on to pass upon it. It has been attempted to suggest a few ideas which might serve as the foundation for a plan of regulation, differing widely from the existing methods, in that it would substitute court remedies in dealing with cases involving the unlawfulness of rates as defined by law, in place of rate-making by a commission; its purpose being to do away with a semi-judicial body exercising incongruous functions, to secure expedition in the settlement of cases without sacrificing any opportunites for careful investigation, to afford some definite basis for dealing with questions involved in the work of regulation, and to facilitate the work of those vested with certain authority to enforce the law. It seems that there are reasons to believe that in the states, where distances are comparatively short and traffic conditions less intricate, as a result of which conditions questions of less complexity are presented to the courts; and where the so-called advisory railway commission have rendered valuable services, that the proposed plan, modeled so as to be adaptable to local conditions, the state courts being, of course, resorted to for enforcement of the law, might prove superior to those now employed in the majority of the states.

Washington, D. C. FRED K. NIELSEN.

[60] 125 Fed. Rep. 252.

MASTER AND SERVANT—TORTS OF SERVANT —LIABILITY OF MASTER.

SHAY v. AMERICAN IRON & STEEL MFG. CO.

Supreme Court of Pennsylvania, May 13, 1907.

A corporation is not liable for damages to a house and injuries to the owner by the negligent shooting by the men employed to take the place of strikers, where the shooting was directed from defendant's premises against a mob, and was not authorized by defendant, and not within the scope of the employment of the persons doing it.

The court entered a compulsory nonsuit, which it subsequently refused to take off. The following is the opinion of the trial court: "The plaintiff is the owner of a house and a lot of ground, situated on Weidman street, in the city af Lebanon, and alleges that on September 20, 1902, several bullets were fired into her dwelling house by enployees of the defendant company, damaging her house, and by reason whereof she was frightened and shocked, thereby causing her to be permanently injured.

"From the testimony produced by the plaintiff it appears that at the time of the alleged injury a large number of the employees of the defendant company were on a strike, and that on the afternoon of September 20, 1902, a car load of colored men, who were engaged to work for defendant, arrived at Lebanon, and were taken to its works inside of the fence inclosing the said works. In taking said car with said colored men from the station to the works, they were followed by a crowd of men and boys, some of whom jumped on the platform of the car, opened the door, and called them vile names, to which no reply was made by any one inside of the car. When the colored men left the car, at the works inside of the inclosure, the persons congregated on the outside commenced to throw stones and other missiles into the inclosure. A number of shots were then fired from the inside and also from the outside. During this time it is alleged, and sworn to by the plaintiff, that a bullet was fired through a second-story window of her house at or near where she was standing, facing the defendant's works and which was afterwards found imbedded in the wall of the house and which produced the said fright and shock. An attempt was also made by the plaintiff to prove that the men brought there that day were armed by the defendant company or at their direction, but

failed. The evidence produced by the plaintiff shows that those of the men who had revolvers had them without the knowledge of the defendant company, and did the shooting that was done against the protest of the persons who had charge of them; that the colored men were not hired to protect the works or the property of the company, but to operate its works; and that the discharge of firearms was not in the course of their employment.

"Assuming, for the purpose of this motion, that the bullets fired into the plaintiff's house were fired by employees of the defendant company, it does not follow that the defendant is liable in damages for injury done to her dwelling or injury done to her person by fright and shock. The law is well settled that a master is only liable for injuries resulting from the willful conduct of his servants if inflicted within the scope of his authority or employment. Railway Co. v. Donahue, 70 Pa. 119; Snodgrass v. Bradley, 2 Grant, Cas. 43; Pennsylvania Co. v. Toomey, 91 Pa. 256; Scanlon v. Suter, 158 Pa. 275, 27 Atl. Rep. 963; Rudgeair v. Traction Co., 180 Pa. 333, 36 Atl. Rep. 859.

"It is contended by the plaintiff's attorneys that the discharge of the firearms by the defendant's employees, was malicious and the evidence produced by the plaintiff justifies the contention. Those who discharged the firearms at the plaintiff's house did so wantonly and recklessly, and were guilty of a criminal offense; and unless it was done within the scope of their employment or by the direction of the employer, and there is no evidence that it was done within the scope of their employment, or by the authority of the employer, the defendant cannot be held liable in damages for injuries suffered by the plaintiff. The acts of the employees complained of by the plaintiff amounting to criminal offenses cannot subsequently be ratified by the defendant company. Building & Loan Association v. Walton, 181 Pa. 201, 37 Atl. Rep. 261; Shisler v. Vandike, 92 Pa. 447, 37 Am. Rep. 702."

Per Curiam: The judgment is affirmed on the opinion of the court below refusing to take off the nonsuit.

NOTE.—*Liability of Master for Injuries Caused by Servant in Violation of Express Directions.*—We have no doubt that under the facts as found and stated by the trial court the decision in the principal case is founded upon correct principles. We have seized upon this case as offering several interesting questions. First, the liability of the master under circumstances similar to those related here, where men hired to take the place of strikers are armed by the company and instructed to protect themselves and the company's property when necessary. Second, whether, under such circumstances, the defendant, knowing that his servants were armed for their own and his protection, he can escape liability by instructions that no one should shoot on the master's premises without permission. We may answer the first question quite readily in the affirmative. The protection of the master's property would, of course, be included in the scope of the servant's employment. Under such circumstances, his negligent handling of the fire-arms would be at the master's risk. The second question, however, presents a little more difficulty. While a master is not liable to a third person for an injury occasioned by his servant by an act committed outside the scope of his employment, he is liable, in the judgment of the best considered cases, where the act is within the scope of the servant's employment, although the master expressly directed the servant not to do the wrongful act committed, or not to do the act in the wrongful or negligent way in which it was committed. Thus, we apprehend, that if a master permits or encourages his servants to arm themselves for their protection and the protection of his premises during the pendency of a strike, the master will be liable for the negligent manner of his servant when using their guns for the purpose mentioned although he might direct them not to shoot and protested ever so violently against it. The test of the master's liability is not the rules and regulations he has imposed upon his servants or his own protest or interference, but simply whether the act is within the scope of the servant's employment. If the servant's employment was for the purpose of protecting the property in times of strikes (men called "strike-breakers") as well as to work at the usual business of master, the scope of the employment is thus enlarged and imposes a wider range of possible liability upon the master from which he cannot escape by showing rules and regulations prohibiting the act in question, or that he protested against its commission.

The United States Supreme Court early laid down this rule in the case of Philadelphia & Reading Ry. Co. v. Derby, 55 U. S. (14 How.) 458, where it was held that the fact that an engineer having control of a colliding locomotive had been expressly forbidden to run on that track at that time and had acted in deliberate disobedience of such orders, was no defense to an action by a third person injured by the collision, on the ground that a master is liable for the tortious acts of his servant, done in the apparent scope of his employment, although they may be done in disobedience of the master's orders. Justice Grier in one of the best opinions that a justice ever delivered said: "There may be found, in some of the numerous cases reported on this subject, *dicta* which, when severed from the context, might seem to countenance the doctrine that the master is not liable if the act of his servant was in disobedience of his orders. But a more careful examination will show that they depended on the question, whether the servant, at the time he did the act complained of, was acting in the course of his employment, or in other words, whether he was not at the time in the relation of servant to the defendant. The case of Sleath v. Wilson, 9 Car. & Payne, 607, states the law in such cases distinctly and correctly. In that case a servant, having his master's carriage and horses in his possession and control, was directed to take them to a certain place; but instead of doing so he went in another direction to deliver a parcel of his own, and, returning, drove against an old woman and injured her. Here the master was held liable for the act of the servant, though at the time he committed the offense, he was acting in disregard of his master's orders; because the master had intrusted the carriage to his control and care, and in driving it he was acting in the course of his employment. Mr Justice Erskine remarks, in this case: "It is quite clear that if a servant, without his master's knowledge, takes his master's carriage out of the coach-house,

and with it commits an injury, the master is not answerable, and on this ground, that the master has not intrusted the servant with the carriage; but whenever the master has intrusted the servant with the control of the carriage, it is no answer, that the servant acted improperly in the management of it. If it were, it might be contended that if a master directs his servant to drive slowly, and the servant disobeys his orders, and drives fast, and through his negligence occasions an injury the master will not be liable. But this is not the law; the master in such cases, will be liable, and the ground is, that he has put it into the servant's power to mismanage the carriage, by intrusting him with it. Although, among the numerous cases on this subject, some may be found (such as the case of Lamb v. Palk, 9 C. & P. 629) in which the courts have made some distinctions which are distinctions which are rather subtle and astute, as to when the servant may be said to be acting in the employ of his master; yet we find no case which asserts the doctrine that a master is not liable for the acts of a servant in his employment, when the particular act causing the injury was done in disregard of the general orders or special command of the master."

Other authorities might be cited which hold to the general proposition that a master is civilly responsible for injuries occasioned by the tortious acts of his servant in the course of his employment, although in disobedience of his master's orders. Southwick v. Estes, 7 Cush. (Mass.) 385; Snyder v. Railroad Co., 60 Mo. 413; Heenrich v. Pullman Palace Car Co., 20 Fed. Rep. 100; Robinson v. Webb, 74 Ky. (11 Bush.) 464; Consolidated Ice Machine Co. v. Keifer, 134 Ill. 481, 25 N. E. Rep. 799, 10 L. R. A. 696, 23 Am. St. Rep. 688; Harris v. Railroad Co., 35 Fed. Rep. 116; Turner v. Railroad Co., 34 Cal. 594; Buel v. The New York, 17 La. 541; Smith v. Munch, 65 Minn. 256, 68 N. W. Rep. 19. To illustrate the important distinction here sought to be made, to-wit, that an act of the servant even when wanton and forbidden by the master will still render the master liable if the act itself is within the scope of the employment of the servant, let us consider a few of the cases. Thus in Reinke v. Bentley, 90 Wis. 457, 63 N. W. Rep. 1055, it was held that the act of the foreman of a building contractor in stretching a guy rope across a railroad track to aid in taking down a derrick is within the scope of his authority so as to render the contractor liable for an accident caused by throwing a rope to a switchman standing on a moving car, where the foreman had general charge of the work, and special charge of moving derricks, though the contractor had expressly instructed him to employ a derrick specialist when moving derricks. So also a telegraph company is liable for the acts of its servants in cutting trees on the land of another to make a way for a telegraph line, though done in disobedience to orders. Postal Telegraph Cable Co. v. Brantley, 107 Ala. 683, 18 So. Rep. 321. So also where a clerk trying to sell a gun for his master, loaded it to show how it worked, although his master had instructed him never to load a gun in the store, the master was held nevertheless liable for the gun's accidental discharge. Garretzen v. Duenckel, 50 Mo. 104, 11 Am. Rep. 405. So also where A sends his servant B to take certain property of A out of C's possession, but definitely instructs him not to assault C or break the law, he is nevertheless liable for an assault committed by B in removing the property. McClung v. Dearborne, 134 Pa. 396, 19 Atl. Rep. 698, 6 L. R. A. 204, 19 Am. St. Rep. 708; Barden v. Felch, 109 Mass. 154. Of course, if the direct prohibition of the master of the servant's particular act will avail him nothing, neither will any number of hard and fast rules promulgated and posted for the direction of the servants in his employ. Toledo, etc., Railroad Co. v. Harmon, 47 Ill. 298, 95 Am. Dec. 489; Harriman v. Railroad Co., 45 Ohio St. 11, 12 N. E. Rep. 418. So also a master is liable for the act of his herder in allowing sheep to trespass upon the lands of another landowner, even though the herder has been expressly directed to keep the sheep off that particular land. French v. Cresswell, 13 Oreg. 418, 11 Pac. Rep. 62. Where a master told his servant not to pile certain lumber on the sidewalk and he did so, nevertheless, the master is liable for injuries caused thereby. Driscoll v. Carlin, 50 N. J. Law, 28, 11 Atl. Rep. 428.

There are some courts which do not recognize the rule here laid down, being confused by other and minor considerations. Thus in the case of Dawkins v. Railroad Co., 77 Tex. 232, 13 S. W. Rep. 984, the court held that the fact that railroad employees, while using a hand car permit a little child to ride with them contrary to the explicit rules of the company, the company is not liable for the child's injury. So also in the case of Andrews v. Green, 62 N. H. 436, the court held that where the defendant's employees in direct disobedience of his orders, and without his or his overseer's knowledge, purposely start a fire in clearing defendant's field, the defendant is not liable for the resulting damage. The New Hampshire court made the grave error in this case by confounding an act done against the express direction of the master as an act done without the scope of the servant's employment. The employment in this case was to clear the defendant's field of brush and to burn the piles of brush only when the overseer was present. Although the servants disobeyed this order of the master they were nevertheless acting within the scope of their employment when they set fire to the brush. The same error is committed by the court in the case of Chicago etc.,, Railroad Co. v. Ferguson, 3 Colo. App. 414, 33 Pac. Rep. 684, where it was held that where a railroad company employed a contractor to plow fire guards along its right of way, and was expressly instructed that when it became necessary for him to go upon private lands he must notify the company, the latter is not liable where such contractor violates his orders and destroys the fences of private landowners. This case really turned upon the question whether or not the servant in this case was an independent contractor or not. The appellate court reverses the action of the lower court in holding that the relation of master and servant existed and that the company was liable for the damage created by their servant notwithstanding their instruction to him. We are inclined to believe that the trial court was right in this case, although we have no space at our command at this time to discuss where the line is to be drawn between a contract creating the relation of master and servant and one which is simply the employment of an independent contractor.

In Michigan the court seems to be on both sides of this question. In the case of Caniff v. Navigation Co., 66 Mich. 638, 33 N. W. Rep. 244, 11 Am. St. Rep. 541, that court held that where the keeper of a boat laid up in winter quarters has positive orders from the owner to allow no one on board without a permit, and disregarding such orders, invites on board a person who is injured by falling through an open hatchway, the owner of the boat is not liable for injuries sustained thereby. In this case the court said: "The ship-keeper was not authorized to invite him

(plaintiff) on board, and he did not represent the owner in calling to him to come forward; and the negligence of the ship-keeper cannot be imputed to the owner. The ship-keeper was not acting in the line of his duty, but in violation of his positive orders." The error in this argument is at once apparent. If it were to be admitted that the violation of the master's orders or his rules and regulations immediately took the servant "out of the line of his duty," meaning by that phrase, out of the scope of his employment, then it is submitted that all a master need to do is to draw up a catalogue of prohibitions sufficient to meet any possible emergency and he has practically emancipated himself from the effect of the great doctrine, *respondeat superior*. The court fails to perceive the distinction between the phrase "out of the line of his duty" and "out of the scope of his employment." It is quite possible to say that a servant by negligently or willfully injuring another is out of the line of his duty, that is, he is not performing the duties of employment in the manner expected of him; but may he not at the same time be within the general scope of his employment, to-wit, may he not be in his negligent and wanton manner, endeavoring to carry on his master's business? The responsibility for employing a careless servant, or one who won't obey orders, must rest upon the master. His negligence consists in the employment of such servants. A later Michigan case, however, shows that the court recognizes the correct principle. In the case of Fitzsimmons v. Railway Co., 98 Mich. 257, 57 N. W. Rep. 127, the court held that though a railroad engineer violates an express rule of the company employing him by running his engine from one station to another without orders from the train dispatcher, he is still acting within the scope of his employment, and the company will be liable for any injury caused by such misconduct. We believe the Michigan court is on solid ground in this last decision on this question but regret that its discussion does not evidence any appreciation of its former error or of the proper distinction to be observed in this line of questions.

A. H. ROBBINS.

JETSAM AND FLOTSAM.

CORRECTION OF A MISSTATEMENT OF FACT.

This is to correct a statement made in our editorial of week before last in regard to the juvenile courts and their judges. We have a letter from Mr. Leroy Armstrong, editor of the Inter-Mountain Republican of Salt Lake City, Judge Brown's home, which shows that we were in error in saying Judge Brown was deposed from his judgship of the juvenile court of Salt Lake City on account of his not being a lawyer. The following is from Mr. Armstrong's letter speaking of Judge Brown: "He was legislated out of office by the effect of a bill which he [Judge Brown] mainly drafted, which he knew would almost certainly destroy his chances to succeed himself. If the old law had remained he would probably have remained too."

(Signed) LEROY ARMSTRONG.

ARE YOU IN THE SADDLE?

Take time to think. Stay away at times from the ever-interrupted desk and the noise and hurry of the shop, and survey your business from the outside. Look at its possibilities for improvement and expansion; study it on all sides. Study the ideas and achievements of others as reported in the trade journals with a view to applying these successful ideas to your own business. How often we hear a printer say he has no time to read his trade journals. To whom has such a one sold his time that he can not use it to his own advantage? What would be the status of a physician or a lawyer who had no time to keep in touch with the constant change and progress of their professions as reported in the medical and law journals? They would surely retrograde and become unsafe advisers. Take time to think! It is really the chief advantage of being one's own master that one can dispose of his time as he pleases. In estimating your success as a business man, the verdict will not depend upon your industry or the number of hours you have worked, but upon the successful application of your mental qualities; therefore, take time to use them. Emancipate yourself from routine; think as a director and not as a mechanic. The successful business men of our day are those who have so-called executive ability, which is in reality thinking ability, coupled with a resolution to make thinking their chief occupation. They plan for others; stimulate others; and study their business with the mental calmness and impartiality of scientific investigators; they are in the saddle.

[We have clipped the above from a publication of the printing trade which we thought to contain some rich kernels of practical truth which even a professional man might find helpful.]

BOOK REVIEWS.

PARKER'S NEW YORK INSURANCE LAW.

This book is a reprint of chapter 38 of the general laws of the state of New York and chapter 690 of the enactments of 1892, and also all amendments enacted in 1907, with elaborate notes and annotations, by Amasa J. Parker, Jr., of Albany, N. Y. Although a local book and although the citations of authorities are mostly from decisions of New York courts, yet the book will be found useful to the profession outside of the state of New York because of the similarity of insurance statutes in the various states, and because of the respect with which New York decisions are held by the courts of other states.

This volume is 12 mo. bound in buckram, 380 pages. Published by The Banks Law Publishing Company, New York.

HUMOR OF THE LAW.

An English sportsman who had a five-pound note stolen from him a few months ago received the following letter the other day:

"Dear Sir—I stoled your money. Remorse naws my conshence, and I send you a sovereign. When remorse naws agin I will send you some more.

"TIP O'RARY."

An admiring constituent of Uncle Lon Livingston thanked him profusely for sending him a copy of memorial speeches in congress on dead statesmen, and he added:

"Colonel, I loves to read these speeches. Nothin' gives me more pleasure than readin' a speech on a DEAD CONGRESSMAN."

Leonidas, with a foxy twinkle in his eye, finally got a glimpse of a doubtful compliment.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. ACCORD AND SATISFACTION—Less than Amount Due.—A parol agreement by a creditor to accept less than is due is void for want of consideration, and cannot be set up in bar as an accord and satisfaction.—Eckert v. Wallace, N. J., 67 Atl. Rep. 76.

2. ACCORD AND SATISFACTION—What Constitutes.—A release of a claim by a city for rentals on land collected after the land had been taken by the city and title had vested in it, and an acceptance and receipt in full of the amount of award for the land, with interest to a certain date, held an accord and satisfaction.—*In re* Seybel, 105 N. Y. Supp. 145.

3. ACTION—Joinder Under Code.—Where a wife, claiming the entire interest in land taken in the name of herself and husband, brought an action against her husband and one who bought his interest at execution sale, to remove the cloud from her title, there is in a legal sense no misjoinder of either parties or subject-matter.—Hudson v. Wright, Mo., 103 S. W. Rep. 8.

4. ADULTERY—Proof.—The fact that a prosecution for adultery was instituted by the wife of accused as required by Code, § 4932, is not an essential element of the offense, and need not be proved beyond a reasonable doubt.—State v. Harmann, Iowa, 112 N. W. Rep. 632.

5. ADVERSE POSSESSION—Payment of Taxes.—The fact that lands were assessed to defendants was not proof that defendants had paid taxes thereon as an evidence of ownership to establish a claim of adverse possession.—Kennedy v. Sanders, Miss., 43 So. Rep. 918.

6. ADVERSE POSSESSION—When Begins.—Where a party enters into possession of land permissively, he continues so, unless he at some time has distinctly and *bona fide* abandoned the premises.—McCutchen v. McCutchen, S. Car., 57 S. E. Rep. 678.

7. APPEAL AND ERROR—Absence of Bill of Exceptions.—Though no bill of exceptions has been settled and filed in a civil appeal, since one is not indispensable to an appeal because error may appear on the face of the record proper, the cause may not be advanced and judgment affirmed.—Wait v. Atchison, T. & S. F. Ry. Co., Mo., 103 S. W. Rep. 60.

8. APPEAL AND ERROR—Excessiveness.—Whether a verdict is excessive is reviewable on appeal only after having been urged as a ground for new trial.—Brockmiller v. Industrial Works, Mich., 112 N. W. Rep. 688.

9. APPEAL AND ERROR—Motion to Instruct a Verdict.—An assignment of error of the trial court in refusing defendant's motion to instruct a verdict in its favor could not be considered on appeal where the motion was made before defendant rested its case, and after the motion was overruled it introduced evidence in its own behalf.—Missouri, K. & T. Ry. Co. of Texas v. Saunders, Tex., 103 S. W. Rep. 457.

10. APPEAL AND ERROR—Order of Appeal.—An entry on the minutes of the trial court showing that an order of appeal made in open court was properly entered on a certain day is all the dating of the order the rules of practice require.—Succession of Dielmann, La., 43 So. Rep. 972.

11. APPEARANCE — Objections to Jurisdiction.—Proceedings by defendant after the sustaining of demurrers to defendant's pleas alleging want of jurisdiction held not to amount to an appearance waiving such objection.—Supreme Hive of Ladies of Maccabees of the World v Harrington, Ill., 81 N. E. Rep. 588.

12. ARREST—Sunday Ball Playing.—It is the right and duty of a sheriff as a peace officer to arrest all persons who may be engaged in his presence in giving a public exhibition of baseball on Sunday, in violation of Pen. Code, § 265, without a warrant.—Paulding v. Lane, 104 N. Y. Supp. 1051.

13. ASSIGNMENT FOR BENEFIT OF CREDITORS—Rights of Creditors.—Under an assignment of a debtor's assets for the benefit of all his creditors, the trust fund must go to the creditors pro rata, and no one of them may by garnishment subject it to the payment of all his debt to the exclusion of others.—Tapp, Leathers & Co. v. Harper, Ark., 103 S. W. Rep. 161.

14. ATTACHMENT — Judgment Against Claimants.—Plaintiff in attachment held not entitled to judgment against claimants, who were unsuccessful in establishing their title to the attached property, where there had been no appraisement as provided by Kirby's Dig. § 3268.—Faulkner & Co. v. Cook, Ark., 103 S. W. Rep. 884.

15. ATTACHMENT—Stock Certificates.—An attachment of stock certificates held not invalid on the ground that the person with whom the sheriff left a certified copy of the warrant and a notice showing the property attached was not the person holding the certificates.—Lowenthal v. Hodge, 105 N. Y. Supp. 120.

16. ATTACHMENT—Wrongful Sale.—Where plaintiff in attachment was a nonresident and wrongfully sold the attached property and converted the proceeds, defendant was entitled to recover on a set-off in the attachment suit the value of the property so converted above plaintiff's debt, interest, and costs.—Abernathy & Pinegar v. Meyer-Bridges Coffee & Spice Co., Ky., 103 S. W. Rep. 342.

17. ATTORNEY AND CLIENT—Action for Attorney's Services.—Where, in an action for attorney's services plaintiff recovered judgment for $300 less $50 on a counterclaim, the court should have rendered judgment for plaintiff for $300, and judgment against him for $50.—Treakle v. Vaughan Abstract Co., Ark., 103 S. W. Rep. 174.

18. ATTORNEY AND CLIENT—Attorney's Lien.—Drafts placed by the owner in the hands of his attorneys for a special purpose held not subject to an attorney's lien for claims held by the attorneys against the owner of the drafts for professional services.—Watts v. Newberry, Va., 57 S. E. Rep. 657.

19. ATTORNEY AND CLIENT—Disbarment.—The appellate court in reviewing proceedings disbarring an attor-

ney should not interfere with the conclusions on the evidence, unless the lower court has decided erroneously.—Zachary v. State, Fla., 43 So. Rep. 925.

20. ATTORNEY AND CLIENT—Fees.—A court in fixing fees for an attorney must be guided by a conscientious estimate of their value, and expert opinion, though of use, is not necessarily controlling.—Dinkelspiel & Hart v. Pons, La., 43 So. Rep. 1018.

21. ATTORNEY AND CLIENT—Unconscionable Fees.—An agreement by a client to pay his attorney one-half of the amount recovered held not unconscionable, in the absence of proof of fraud or that the compensation was excessive.—Ransom v. Cutting, N. Y., 81 N. E. Rep. 324.

22. BANKRUPTCY—Assigned Claim.—In an action on a claim assigned by bankrupts with the consent of the trustee, defendants, not having paid for the goods, could not assert the right of the trustee as against the title acquired by plaintiff with his consent.—Oldmixon v. Severance, 104 N. Y. Supp. 1042.

23. BANKRUPTCY—Preferences.—In an action by a trustee in bankruptcy to recover a preference given a creditor, an instruction held not erroneous as instructing that the bankrupts were insolvent when they made the transfer.—Galveston Dry Goods Co. v. Frenkel, Tex., 103 S. W. Rep. 224.

24. BANKS AND BANKING — Authority of Cashier.—A bank may restrict the authority of its cashier, and when this is done it is bound to those having notice, actual or constructive, of the restriction to the extent of the cashier's actual authority.—Citizens Bank v. Bank of Waddy's Receiver, Ky., 103 S. W. Rep. 249.

25. BANKS AND BANKING—Loss of Collateral.—A bank, receiving through its cashier bonds as collateral to secure a note held by it, held responsible for a loss sustained in consequence of the cashier converting the bonds to his own use.—First Nat. Bank v. Sing Sing Gas Mfg. Co., 104 N. Y. Supp. 1040.

26. BANKS AND BANKING—Garnishment.—A bank which pays as garnishee under execution against a judgment debtor other than its depositor, though bearing the same name, the deposit or a part thereof of such depositor, is liable to him to the amount of the payment.—O'Neil v. New England Trust Co., R. I., 67 Atl. Rep. 63.

27. BENEFIT SOCIETIES—Assessments.—Where a beneficial association reincorporated after issuing a certificate to complainant, after 10 years after the reincorporation held too late for complainant to insist that his certificate shall be treated, as to assessments, otherwise than as if it been issued after such reincorporation.—Wineland v. Knights of Maccabees of the World, Mich., 112 N. W. Rep. 606.

28. BANKRUPTCY—Claim Under Chattel Mortgage.—A claimant to property of a bankrupt under an unrecorded chattel mortgage cannot by reason of possession within four months preceding the bankruptcy proceedings hold possession as against the trustee in bankruptcy.—Cornelius v. Boling, Okla., 90 Pac. Rep. 874.

29. BENEFIT SOCIETIES—Forfeiture of Insurance.—Acceptance of dues from a member by a fraternal society, without knowledge that he had forfeited his insurance by engaging in an extra hazardous occupation, did not constitute a waiver of the forfeiture.—Glenty v. Knights of Columbus, 105 N. Y. Supp. 244.

30. BILLS AND NOTES—Indorsement Before Delivery.—Negotiable Instruments Act (P. L. 1902, p. 594), §§ 63, 64, subject a person not otherwise a party to a note, who places his signature thereon in blank before delivery, to the liability of indorser.—Gibbs v. Guaraglia, N. J., 67 Atl. Rep. 81.

31. BROKERS—Compensation.—Where real estate brokers asked the owner of a lot who lived in another city to come to their office on a day stated to meet a buyer herefor there was not such a production of a purchaser as entitled them to compensation; it being their duty to produce the purchaser to him.—Lotz v. Levy, 104 N. Y. Supp. 1058.

32. BURGLARY—Purpose of Entry.—In a prosecution for burglary held, that the court should have charged that, if defendant went into the house for the purpose of getting his own clothes, and secured them and no other property, he would not be guilty of burglary.—Harris v. State, Tex., 103 S. W. Rep. 390.

33. CARRIERS—Delay in Transportation.—A delay of a month in the transportation of freight a distance of 33 miles is unreasonable, and the carrier is liable for the damages sustained.—Chesapeake & O. Ry. Co. v. Saulsberry, Ky., 103 S. W. Rep. 254.

34. CARRIERS—Fires Set by Engine.—In an action against a railroad company for injuries to plaintiff's orchard by fire, plaintiff held not negligent in permitting the orchard to grow up with weeds, grass, and brush.—Louisville & N. R. Co. v. Beeler, Ky., 103 S. W. Rep. 300.

35. CARRIERS—Injury to Alighting Passengers.—Where a street car has been brought to a stop to enable passengers to alight, it is the carrier's duty to examine the exits to see that no passenger is in the act of alighting before signaling the car to proceed.—Bell v. Central Electric Co., Mo., 103 S. W. Rep. 144.

36. CARRIERS—Injury to Stock.—It was no defense in an action against a carrier of live stock for delay in shipment that the shipper did not sell upon the first market after arriving at destination, where evidence showed that by reshipment the damages were lessened.—Tiller & Smith v. Chicago, B. & Q. Ry. Co., Iowa, 112 N. W. Rep. 631.

37. CARRIERS—Loss of Goods in Transit.—Where pipe is bought in C, to be delivered at E, for reshipment to the buyer at P, any shortage arising after the reshipment was the buyer's loss.—Mark v. H. D. Williams Cooperage Co., Mo., 103 S. W. Rep. 20.

38. CARRIERS—Transfers.—A street railway company must transport for a single fare a passenger boarding a car whether the same is a short-service or a long service car.—Baron v. New York City Ry. Co., 105 N. Y. Supp. 258.

39. CHARITIES—Injury to Employee.—A railroad, maintaining as a separate organization a hospital for the benefit of its employees, held liable in damages to an employee injured by reason of the railroad's negligence in selecting competent physicians, surgeons, or attendants.—Illinois Cent. R. Co. v. Buchanan, Ky., 103 S. W. Rep. 272.

40. CHATTEL MORTGAGES — Innocent Purchasers.—A *bona fide* purchaser of grain from a mortgagor, having only constructive notice by the record, is not protected as an innocent purchaser by the mere fact that the mortgagee permitted the mortgagor to thresh and sell the grain.—Endreson v. Larson, Minn., 112 N. W. Rep. 628.

41. COMMERCE—Act Imposing Liability on Telegraph Companies.—Code 1904, § 1294—h, cl. 6, imposing a penalty on telegraph companies for failure to deliver telegraph messages, held not a violation of the commerce clause of the federal constitution as applied to messages sent from a point within the state to the Norfolk Navy Yard.—Western Union Telegraph Co. v. Chiles, Va., 57 S. E. Rep. 587.

42. COMMERCE — Occupation Taxes. — The commerce clause of the federel constitution does not apply to the levy of occupation taxes on a business wholly within the state, though sales and deliveries are made without the state.—Texas Co. v. Stephens, Tex., 103 S. W. Rep. 481.

43. CONSTITUTIONAL LAW—Severity of Punishment.—An objection to the constitutionality of Acts 19 Leg., p. 358, ch. 148, because of the severity of measures authorized for its enforcement, and the penalties imposed, cannot be considered where none of such provisions were attempted to be enforced in the instant case.—Texas Co. v. Stephens, Tex., 103 S. W. Rep. 481.

44. CONSTITUTIONAL LAW—Destruction of Hogs.—Act March 30, 1903 (Acts 1903, p. 183), authorizing the summary destruction of hogs running at large upon a public levee, is a proper exercise of police power to prevent

damage to the levees, and not unconstitutional as depriving one of property without due process of law.—Ross v. Desha Levee Board, Ark., 103 S. W. Rep. 380.

45. CONTEMPT—Hearing Before Magistrate.—Where a decree required defendant to turn over one-third of the crop made on certain lands, the court should require defendant to submit to an examination as to such crop before passing on rule for contempt for failure to turn over such crop.—Smith v. Smith, S. Car., 57 S. E. Rep. 666.

46. CONTRACTS—Compensation of Medical Expert.—A contract to pay a medical expert extra compensation for testimony he could be compelled to give under a subpœna held void, though the party employing him at the time he was subpœnaed knew his custom to charge extra for his testimony.—Burnett v. Freeman, Mo., 108 S. W. Rep. 121.

47. CONTRACTS—Conditions Precedent.—A declaration by one party to a contract, made prior to the time fixed for performance, that he will not comply with the contract, may dispense with an offer to perform by the other party before bringing action.—Longfellow v. Huffman, Oreg., 90 Pac. Rep. 907.

48. CONTRACTS — Construction of Written Words. — Where one attempts to accept in writing an offer made in writing, there is no mutual agreement that certain specific written words shall stand as a statement of the trade ultimately struck between the parties.—Metropolitan Coal Co. v. Boutell Transportation & Towing Co., Mass., 81 N. E. Rep. 645.

49. CONTRACTS—Part Performance.—Where it was admitted that plaintiff's assignor furnished defendant gas fixtures, but did not hang them as he agreed to, it was error to award judgment against defendant for the contract price; defendant having expended money in hanging the fixtures.—Baldinger & Kupferman Mfg. Co. v. Christ, 105 N. Y. Supp. 193.

50. CORPORATIONS—Authority of Director. — The director of a corporation acquires no additional authority to act for the corporation because he owns a majority of the corporate stock.—Clement v. Young-McShea Amusement Co., N. J., 67 Atl. Rep. 82.

51. CORPORATIONS—Fiduciary Position of President.—The relation between a corporation and its president acting as its general manager is a fiduciary relation, and he is not permitted to secure to himself any profit in the management of the company's affairs not known to other stockholders.—Tevis v. Hammersmith, Ind., 81 N. E. Rep. 614.

52. CORPORATIONS—Ratification.—That a corporation received and retained the benefit of an unauthorized agreement by one of its officers held not to be a ratification thereof; the corporation being without knowledge of the agreement.—Hurlbut v. Gainor, Tex., 103 S. W. Rep. 409

53. CORPORATIONS—Refusal to Pay Calls on Stock.—Refusal of a shareholder to pay calls on his stock in a corporation does not constitute a repudiation of his status as a shareholder.—Electric Welding Co. v. Prince, Mass., 81 N. E. Rep. 806.

54. COSTS—Security.—A lawyer prosecuting an action for a contingent fee is under no obligation to give security for costs when the client is ordered so to do and is unable to comply with the order so to do.—Stevens v. Sheriff, Kan., 90 Pac. Rep. 799.

55. COURTS—Poll Taxes.—The supreme court has no jurisdiction of a suit by citizens and taxpayers to compel a compliance with the law requiring a list of those who had paid their poll taxes to be filed with the clerk of court.—State v. Briede, La., 43 So. Rep. 992.

56. COVENANTS—Building Restrictions.—Purchaser of lots having knowledge of a recorded instrument creating building restrictions held not bound thereby, where the instrument was not duly acknowleged as required by law.—Schefer v. Ball, 104 N. Y. Supp. 1028.

57. CRIMINAL EVIDENCE — Footprints. — Where the state's proof tending to show defendant committed arson depended largely on the peculiarity of footprints found, testimony tending to show defendant altered his shoes after the offense held admissible.—Moore v. State, Tex., 103 S. W. Rep. 185.

58. CRIMINAL EVIDENCE—Homicide. — Evidence that defendant was apparently sober shortly after committing the offense held admissible on rebuttal, where drunkenness was relied on to reduce the degree of guilt. —Heninburg v. State, Ala., 43 So. Rep. 959.

59. CRIMINAL EVIDENCE—Insanity. — Two newspaper reporters whose only acquaintanceship with accused consisting of a conversation for a half hour after the killing held not intimate acquaintances, authorized to give their opinion concerning his insanity under Code Civ. Proc., § 3146, subd. 10.—State v. Penna, Mont., 90 Pac. Rep. 787.

60. CRIMINAL EVIDENCE—Records. — The removal of the marriage record of the probate judge of a county to the criminal court of the county and there offered in evidence was not removed to another county from the one where the record was required to be kept, in violation of Code 1896, § 2643.—Nelson v. State, Ala., 43 So. Rep. 966.

61. CRIMINAL EVIDENCE—Receiving Stolen Goods.—In a prosecution for receiving stolen goods, any error in admitting evidence of a prior receipt of stolen goods held cured by striking out that evidence upon motion of the state's attorney after electing to rely on a subsequent act. —Lipsey v. People, Ill., 81 N. E. Rep. 848.

62. CRIMINAL LAW—Former Jeopardy. — Where the facts necessary to convict on a second prosecution would not necessarily have convicted on the first prosecution, the first prosecution, if dismissed after jeopardy has attached, will bar the second prosecution.—State v. Reed. Ind., 81 N. E. Rep. 571.

63. CRIMINAL TRIAL—Discretion of Court.—Refusal to allow *profert* for the purpose of showing the relative size of defendant and B, whom he was charged with assault with intent to kill, held not an abuse of discretion. —McFarland v. State, Ark., 103 S. W. Rep. 169.

64. CRIMINAL TRIAL—Evidence at Preliminary Hearing.—Where accused in a criminal case testified on the examining trial, it was not error to permit the judge conducting the examining trial to testify in chief to what accused testified to.—Freeman v. Commonwealth, Ky., 103 S. W. Rep. 274.

65. CRIMINAL TRIAL—Homicide.—On a trial for homicide, a physician who treated decedent during the last days of her life held entitled to state what deceedent said to him as to her condition, past and present, to enable him to properly diagnose her case.—State v. Blydenburg, Iowa, 112 N. W. Rep. 624.

66. CRIMINAL TRIAL — Motion to Withdraw Plea.— Where a party pleaded not guilty and when the case was called he withdrew his plea and pleaded guilty to a lesser offense, and when he was called up for sentence he moved to withdraw his plea of guilty and pleaded not guilty, held, that the motion was properly denied.—State v. Boutte, La., 43 So. Rep. 983.

67. CRIMINAL TRIAL—Offer of Evidence.—Where accused made an offer of evidence during the recess of the court, but no ruling was either requested or had, accused was not entitled to insist on appeal that the evidence offered was admitted.—State v. Bricker, Iowa, 112 N. W. Rep. 645.

68. CUSTOMS AND USAGES—Must be Alleged and Proved. —The fact that the privilege of sawing the timber into lumber is a customary consequence of its sale must be alleged and proved by satisfactory evidence, and it is not sufficient to simply set it up in the answer.—Bowles v. Rice, Va., 57 S. E. Rep. 575.

69. DAMAGES—Personal Injuries.— $1,250 held not an excessive verdict for injury to a four year old child caused by a passenger coach window sash falling upon one of her hands, where some of her fingers are permanently injured, and her prospective musical talent was impaired.—Gulf, C. & S. F. Ry. Co. v. Sauter, Te 103 S. W. Rep. 201.

70. DEATH—Damages.—In an action for the wrongful death of a minor child, the recovey must be confined to the pecuniary loss sustained by the death of the child, and damages for loss of companionship are not recoverable.—Dando v. Home Telephone Co., Mo., 103 S. W. Rep. 103.

71. DEATH—Nominal Damages.—Under Hurd's Rev. St. 1905, p. 1152, ch. 70, where, in an action for wrongful death, the next of kin are collateral kindred of the deceased, and have not received pecuniary aid from him, and are not in a situation to require it, only nominal damages can be recovered.—Rhoads v. Chicago & A. R. Co., Ill., 81 N. E. Rep. 371.

72. DEDICATION—Validity.—A dedication by the state to the "People of New Orleans, for public use for a public park or amusement park purposes," of a parcel of land, held a dedication to the public.—Saucier v. City of New Orleans, La., 43 So. Rep. 999.

73. DEEDS—Conveyances to Child.—The ordinary family relations existing between a woman and her daughter and son-in-law held not to constitute such fiduciary relation as to render a deed from the mother to her daughter *prima facie* illegal.—Bishop v. Hilliard, Ill., 81 N. E. Rep. 403.

74. DEEDS—Description.—A deed in which the land is described by sections, townships, and ranges according to the government surveys and records, may be good, even though the name of the county is not mentioned.—Black v. Skinner Mfg. Co., Fla., 43 So. Rep. 919.

75. DEPOSITS IN COURT—Withdrawal.—In replevin to recover mortgaged property where the mortgagor paid into court a certain amount in payment of the mortgage debt, which the mortgagee refused to accept, an order after verdict for the mortgagee permitting the mortgagor to withdraw the money is not erroneous.—Windsor v. Snider, Kan., 90 Pac. Rep. 820.

76. DIVORCE—Cruelty.—Divorce for extreme cruelty should be denied where there is no violence, unless the abuse be such as damages health or renders living together intolerable or unsafe.—Beekman v. Beekman, Fla., 43 So. Rep. 928

77. DOWER—Equitable Interest.—A bill by a widow to recover dower in land in which her husband with another had held an equitable interest in his lifetime, failing to allege that purchasers were not *bona fide* purchasers for value without notice, held fatally defective. Hutchinson v. Olberding, Iowa, 112 N. W. Rep. 647.

78. DOWER—Mortgages.—A judgment foreclosing a mortgage executed by a husband alone cannot affect the paramount inchoate dower right of the wife, a party to the suit because of subsequent alleged lien.—Anderson v. McNeely, 105 N. Y. Supp. 278.

79. DRUGGISTS—Negligence.—In an action against a druggist for negligently selling acetanilid, for phosphate of soda, it was not necessary that the complaint set forth the circumstances tending to show negligence; it being sufficient to allege the act was negligently done.—Knoefel v. Atkins, Ind., 81 N. E. Rep. 600.

80. ELECTRICITY—Insulation.—It is an electric company's duty to have its wires to which the public or persons whose duty calls them in proximity thereto will be exposed insulated.—San Antonio Gas & Electric Co. v. Badders, Tex., 103 S. W. Rep. 229.

81. EMINENT DOMAIN—Inconvenience as Element of Damage.—The inconvenience resulting from the loss of a home and in moving is not a proper element of damage in a condemnation proceeding by a railroad company.—Madisonville, H. & E. R. Co. v. Ross, Ky., 103 S. W. Rep. 330.

82. EQUITY—Accounting.—The court of chancery has power to take an accounting between the parties in a suit brought to set aside a sale of land and fix the terms upon which relief is granted, though there be only a general prayer for relief, and no prayer specifically asking for an accounting.—Beall v. Dingman, Ill., 81 N. E. Rep. 306.

83. ESTOPPEL—Acquiescence.—Where a city council has vacated a street, and a railroad company has entered thereon, and the owner of the adjacent lots takes no steps to prevent vacation, both parties are estopped from questioning the validity of the ordinance.—Blackwell, E. & S. W. Ry. Co. v. Gist, Okla., 90 Pac. Rep. 889.

84. ESTOPPEL—Replevin Bond.—Defendant in replevin having given a delivery bond, held estopped to deny possession at the time the property was seized under the writ.—Indiana Union Traction Co. v. Bick, Ind., 81 N. E. Rep. 617.

85. EVIDENCE—Fraud.—In an action for fraud in procuring an application and a note for the first year's premium for a life policy, certain evidence held admissible on the issue of intent.—Hartford Life Ins. Co. v. Hope, Ind., 81 N. E. Rep. 595.

86. EVIDENCE—Fraudulent Conveyances.—Statements made in the absence of grantee by grantor and the attorney who prepared the deed, tending to show that the same was not executed in good faith, held inadmissible against grantee to impeach the deed.—Hargus v. Hayes, Ark., 103 S. W. Rep. 163.

87. EVIDENCE—Judicial Notice.—Judicial notice will be taken of the years during which the Boer War was in progress.—Dowie v. Sutton, Ill., 81 N. E. Rep. 395.

88. EVIDENCE—Written Contract.—A written contract between a carrier and shipper for the shipment of cattle could not, in the absence of fraud or mistake, be added to by parol evidence of a prior agreement that the cattle should be delivered at a certain packing house.—International & G. N. R. Co. v. Griffith, Tex., 103 S. W. Rep. 225.

89. EXECUTION—Claim of Third Party.—A sheriff will not be enjoined from putting purchaser of land at sheriff's sale in possession, because the sheriff refused to accept from the applicant a claim affidavit tendered before sale, where it did not comply with the statute, and the land was subject to the lien of the execution.—O'Brien v. O'Keefe, Ga., 57 S. E. Rep. 682.

90. EXECUTION—Return.—Where claimants of attached property failed to establish their title and did not surrender the property to the sheriff on execution on the original judgment, it was the sheriff's duty to show such fact in his return.—Faulkner & Co. v. Cook, Ark., 103 S. W. Rep. 384.

91. EXECUTORS AND ADMINISTRATORS—Sale of Land.—Where a portion of a devise was void, the executor may sell the entire premises in order to carry out the valid portion; the heir taking the part of the proceeds representing the invalid portion, as real estate, unchanged by its conversion into money.—Bender v. Paulus, 105 N. Y. Supp. 240.

92. FALSE PRETENSES—County Warrant.—One obtaining warrant from the county for which he has already been paid held guilty of obtaining money under false pretenses.—State v. Talley, S. Car., 57 S. E. Rep. 618.

93. FALSE IMPRISONMENT—Evidence.—Where one guilty of a felony is lawfully arrested without a warrant and discharged before his detention has become unlawful through an unreasonable delay, such discharge does not make the original arrest unlawful.—Atchison, T. & S. F. Ry. Co. v. Hinsdell, Kan., 90 Pac. Rep. 800.

94. FIRE INSURANCE—Forfeiture.—A fire policy in the standard form held not forfeited by the use by a painter of a gasoline torch for the purpose of burning paint off the insured building.—Garrebrant v. Continental Ins. Co., N. J., 67 Atl. Rep. 90.

95 FIXTURES—Unlawful Severance.—The owner of land from which a fixture has been wrongfully severed may adopt the unauthorized act, treat the article as personalty, and sue for its recovery, or may elect to sue for damages to the land.—Martin v. Ferguson, Ky., 103 S. W. Rep. 257.

96. FRAUD—Punitive Damages.—Where soliciting agents of an insurer were not liable for punitive damages for fraudulent representations in procuring an ap-

plication for a life policy, the insurer was not liable for such damages —Hartford Life Ins. Co. v. Hope, Ind., 81 N. E. Rep. 595.

97. FRAUDS, STATUTE OF—Memorandum of Sale.—A contract for the sale of certain sheep, "Woods range delivered," without a memorandum in writing or a payment of part of the price, held within the statute of frauds and unenforceable.—Ladnier v. Ladnier, Miss., 43 So. Rep. 946.

98. FRAUDS, STATUTE OF—Parol Partnership Contract. —A parol agreement creating a partnership to purchase and sell real estate for speculation and to divide the profits among the partners is not within the statute of frauds.—Miller v. Ferguson, Va., 57 S. E. Rep. 549.

99. FRAUDS, STATUTE OF—Verbal Contract for Sale of Land.—Where, under a verbal contract for the sale of land, the purchaser has received a deed of the premises, the statute of frauds has no application, and the vendor may recover unpaid purchase price.—Knight v. Collings, Ill., 81 N. E. Rep. 846.

100. FRAUDULENT CONVEYANCES—Transfer in Trust for Self.—A person cannot, as against creditors, either prior or subsequent, settle his property in trust for his own use for life, and over to his appointees by will, and in default of such appointment, to use of his lawful heirs in fee.—Nolan v. Nolan, Pa., 67 Atl. Rep. 52.

101. GIFTS—Bank Checks.—Checks drawn on decedent's bank account and delivered to payee, but not accepted or paid by the bank prior to the drawer's death, held not to constitute a valid gift of the amounts of the checks.—Pennell v. Ennis, Mo., 103 S. W. Rep. 147.

102. GIFTS—Delivery.—Where decedent caused money to be deposited in a savings bank to the credit of his two sisters, the delivery to the bank was a delivery to them. —Succession of Zacharie, La., 43 So. Rep. 988.

103. GUARDIAN AND WARD—Appointment of Guardian. —Where minor children over 14 years with the consent of their parents, apply for the appointment of a guardian, the proceeding is not open to collateral attack on the ground that the parents are the natural guardians.—Wirsig v. Scott, Neb., 112 N. W. Rep. 655.

104. HOMESTEAD—When Estate Vests.—A distributee is not entitled to homestead in the amount found due her until a judgment recovered against her by her administratrix for conversion of the property is paid.—Small v. Usher, S. Car., 57 S. E. Rep. 623.

105. HOMICIDE—Assault with Intent to Kill.—An information for a felonious assault with a pistol held not defective for failing to allege that the pistol was pointed at a vital part of the person of the party assaulted and when within shooting distance.—State v. Wilson, Mo., 103 S. W. Rep. 110.

106. HOMICIDE—Instrument of Death.—Where a knife was the instrument used in a homicide, it was competent for a physician to testify whether an instrument of certain length and size that had inflicted a certain wound would be a deadly weapon.—Hardin v. State, Tex., 103 S. W. Rep. 401.

107. HOMICIDE—Necessary Evidence.—Where one is charged with murder by the administration of a designated poison, the possession by accused of such poison at the time of the alleged offense is a necessary condition to support a conviction.—State v. Blydenburg, Iowa, 112 N. W. Rep. 684.

108. HOMICIDE—Threats.—The state in a case in which drunkenness was relied on to reduce the degree of homicide held entitled to prove defendant's prior threats to kill deceased.—Heninburg v. State, Ala., 43 So. Rep. 959.

109. HUSBAND AND WIFE—Liability of Husband.—Where the husband and wife are living apart, one who seeks to recover against the husband for necessaries furnished the wife has the burden of showing that the circumstances are such as to render the husband liable. —Pickhardt v. Pratt, 105 N. Y. Supp. 286.

110. INFANTS—Custody.—Rev. St. 1895, art. 3502a, giving county courts the right to rescue children from the custody of improper persons upon petition, and art. 3502b, providing for similar proceedings by *habeas corpus*, held unconstitutional under Const. art. 5, §§ 8, 16.—*Ex parte* Reeves, Tex., 103 S. W. Rep. 478.

111. INFANTS—Marriage Settlement.—A marriage settlement in regard to her real estate, joined by an infant *feme sole*, is voidable as to her, and she may disaffirm the same after becoming of age where she has done nothing to affirm it.—Smith v. Smith's Ex'r., Va., 57 S. E. Rep. 577.

112. INJUNCTION—Construction of Drain.—Relief afforded landowners assessed to pay for construction of drainage system from which they receive no benefit, but only injury, held limited to restraining assessment of their land and not to restraining the construction of the system.—Coffman v. St. Francis Drainage Dist., Ark., 103 S. W. Rep. 179.

113. INJUNCTION — Destruction of Trade.—Equitable jurisdiction held to lie to restrain a state officer from unlawfully placing in the hands of every stock food dealer in the state a bulletin in effect threatening them with prosecution if they should use a certain manufacturer's product sold in lawful form.—Pratt Food Co. v. Bird, Mich., 112 N. W. Rep. 701.

114. INJUNCTION—Pollution of Wells.—Where an injunction was asked to restrain defendants from establishing a cemetery where it would pollute plaintiff's wells and springs held, that the rule as to the balance of convenience did not apply.—Elliott v. Ferguson, Tex., 103 S. W. Rep. 453.

115. INJUNCTION—Prohibiting Enforcement of Criminal Law.—Equity will not interfere to enjoin a sheriff from enforcing Pen. Code, § 265, prohibiting baseball exhibitions on Sunday.—Paulding v. Lane, 104 N. Y. Supp. 1051.

116. INJUNCTION—Right of Privacy.—Whether a photographer had exhibited photographs of a certain person in a defendant trading stamp company's shop, or had made a contract with defendant to display photographs there, held not to affect defendant's liability for an unauthorized use of plaintiff's photographs in an action for injunction and damages.—Rhodes v. Sperry & Hutchinson Co., 104 N. Y. Supp. 1102.

117. INTOXICATING LIQUORS—Local Option.—The general local option law, and not special or local acts prohibiting the sale of intoxicating liquor governs as to the quantity that may be sold by manufacturers or wholesalers without making the sale unlawful and as to the penalty to be imposed for an unlawful sale.—Stamper v. Commonwealth, Ky., 103 S. W. Rep. 286.

118. JUDGMENT—Occupation Taxes.—In a suit against state officers to enjoin the collection of occupation taxes, to which the state was not a party, defendants had no such right of action for taxes as entitled them to a judgment therefor.—Texas Co. v. Stephens, Tex., 103 S. W. Rep. 481.

119. JUDGMENT—Setting Aside Default.—A court cannot consider matters going to the merits of the case presented in the affidavit in support of a motion to vacate a judgment by default and set aside the default since these must be tried in the regular way.—Cutler v. Haycock, Utah, 99 Pac. Rep. 897.

120. JURY—Residence.—The temporary absence of a juror from his parish will not destroy his qualification for jury service when he had no intention to change his permanent abode.—State v. Wimby, La., 43 So. Rep. 984.

121. LANDLORD AND TENANT—Liability of Landlord.—Landlord held not liable for injuries to one inspecting an apartment who opens a door and steps into a dark passageway.—Robinson v. Crimmins, 104 N. Y. Supp. 1076.

122. LANDLORD AND TENANT—Purchase by Tenant of Outstanding Title.—Where a tenant in possession purchases an outstanding title, he is bound *bona fide* to give up possession and to continue his action to try title and recover by the strength of his own title.—McCutchen v. McCutchen, S. Car., 57 S. E. Rep. 678.

128. LANDLORD AND TENANT—Rescission of Lease.—Under the facts lessees held not entitled to a rescission of the lease on the ground that lessor had been falsely rep-

resented to be the owner of the entire premises.—Finch v. Causey, Va., 57 S. E. Rep. 562.

124. LIBEL AND SLANDER—Character Evidence.—In an action for slander, plaintiff held entitled to prove by a witness who had lived in the same town with her all his life, and had been a newspaper reporter for three years, that during that time he had never heard a word derogatory to plaintiff's reputation for chastity.—Smitley v. Pinch, Mich., 112 N. W. Rep. 686.

125. LIFE INSURANCE—Acceptance of Offer by Mail.—Acceptance by insured by mail of an option under a life insurance policy held to complete contract when mailed, and not to be revoked by death of insured before receipt of letter of acceptance by company.—Northwestern Mut. Life Ins. Co. v. Joseph, Ky., 103 S. W. Rep. 317.

126. MANDAMUS—Membership in Church.—*Mandamus* is the proper remedy to secure the reinstatement of one unlawfully deposed from membership in a church without cause or hearing.—Hughes v. North Clinton Baptist Church of East Orange, N. J., 67 Atl. Rep. 66.

127. MASTER AND SERVANT—Action for Personal Injury.—A steel mill company and its master mechanic were properly joined in an action for injuries to plaintiff charged to have been caused by the master mechanic directing him to work in an alleged unsafe place.—Republic Iron & Steel Co. v. Lee, Ill., 81 N. E. Rep. 411.

128. MASTER AND SERVANT—Assumption of Risk.—In an action for injuries to plaintiff while operating an elevator, where it was shown that he had been operating the elevator for four years, he was an experienced operator and assumed the dangers incident to his employment.—Diamond Glue Co. v. Wietzychowski, Ill., 81 N. E. Rep. 392.

129. MASTER AND SERVANT—Assumption of Risk.—An instruction limiting assumed risks to those not arising from the master's negligence held erroneous in a case where there was some evidence that the employee knew of the danger.—Illinois Cent. R. Co. v. Fitzpatrick, Ill., 81 N. E. Rep. 529.

130. MASTER AND SERVANT—Assumption of Risk.—An employee, who attempted to cross a room while it was in darkness, held to have assumed the risk of walking into an open vat containing revolving rollers.—Krug v. American Sugar Refining Co., 104 N. Y. Supp. 1072.

131. MASTER AND SERVANT—Cause of Injury.—In an action for injuries to a servant, plaintiff's foreman and overseer held not fellow servants, so as to relieve defendant from liability for failure to instruct plaintiff as to the use of a dangerous machine and to warn him of the danger.—Brockmiller v. Industrial Works, Mich., 112 N. W. Rep. 688.

132. MASTER AND SERVANT—Condition of Machinery.—In an action by a servant for personal injuries, testimony of one, who left defendant's employ four days before the accident, that the machinery was out of repair three weeks before he left, held admissible.—Reich v. Ironclad Mfg. Co., 104 N. Y. Supp. 1069.

133. MASTER AND SERVANT — Contributory Negligence.—Where plaintiff was employed to inspect cars in a railway yard, he cannot recover for injuries received in a fall caused by the breaking of defective grab iron on a car he was inspecting, where he failed to apply the usual tests to ascertain if it was safe.—Browder v. Southern Ry. Co., Va., 57 S. E. Rep. 572.

134. MASTER AND SERVANT—Injuries During Strikes.—A corporation owning iron works held not liable for damages to persons and property for negligent shooting by men engaged to take place of strikers.—Shay v. American Iron & Steel Mfg. Co., Pa., 67 Atl. Rep. 54.

135. MASTER AND SERVANT—Injury to Employee.—Where a railroad employee with a lighted lantern is killed on a dark night at a terminal station by being run over by a backing locomotive, held under the evidence, that the company would be liable therefor, though the employee may have been at fault; his fault being slight compared with that of the company.—Dobyns v. Yazoo & M. V. R. Co., La., 43 So. Rep. 984.

136. MASTER AND SERVANT—Injury to Employee.—Where an employee in a planing mill is injured while operating for his own purpose a machine not a part of the machinery of the mill, the proprietor of the mill is not liable for resulting damage.—Gross v. Fisher Lumber & Mfg. Co., La., 43 So. Rep. 1006.

137. MASTER AND SERVANT—Wrongful Discharge.—In an action by an employee for a wrongful discharge, the employer may, under the general denial, show that the employee voluntarily resigned in anticipation of a threatened discharge.—New York Life Ins. Co. v. Thomas, Tex., 103 S. W. Rep. 423.

138. MINES AND MINERALS—Mining Lease.—A provision in a mining lease that the lessee should leave sufficient pillars to support the surface held not a covenant, but a condition which, if violated, terminated the lessee's estate at the election of the lessor.—Geer v. Boston Little Circle Zinc Co., Mo., 103 S. W. Rep. 151.

139. MORTGAGES—Use of Streets.—The mortgaging by a city of the right to use its streets for street railway purposes to secure the payment of street railway certificates is not a grant of their use as a gratuity, so as to bring the act within the rule that a court of equity will not interfere with the city in making such grant as a gratuity.—Lobdell v. City of Chicago, Ill., 81 N. E. Rep. 354.

140. MUNICIPAL CORPORATIONS—Defective Streets.—A municipal corporation's duty to provide reasonably safe streets is performed when a way of sufficient width which is smooth and convenient for travel is prepared and maintained.—Mitchell v. Tell City, Ind., 81 N. E. Rep. 594.

141. MUNICIPAL CORPORATIONS—Fire Ordinance.—An ordinance, prohibiting the erection, removal, or remodeling of a frame structure within 60 feet of a brick or stone building without the consent of the owner of the latter, held void for unreasonableness.—Tilford v. Belknap, Ky., 103 S. W. Rep. 289.

142. MUNICIPAL CORPORATIONS—Liability for Torts.—A city held liable for the negligence of its servant engaged in removing piles of dirt from the street.—Young v. Metropolitan St. Ry. Co., Mo., 103 S. W. Rep. 135.

143. MUNICIPAL CORPORATIONS—Obstruction in Street.—If a passageway leading from a waiting room in a store to an elevated railroad station is in fact an unlawful obstruction, the city is not estopped to remove it by an unaccepted proposition to permit its use for a money consideration.—Rothschild & Co. v. City of Chicago, Ill., 81 N. E. Rep. 407.

144. MUNICIPAL CORPORATIONS—Power to Abate Nuisance.—The power given a city to abate any nuisance is governmental, and the city is not liable for damages from private nuisance resulting from its omission to exercise the power by resolutions or ordinances.—City of Mansfield v. Brister, Ohio, 81 N. E. Rep. 631.

145. MUNICIPAL CORPORATIONS—Street Improvements.—Resurfacing a street with asphalt after a prior asphalt surface had fallen into decay held not a reconstruction, but a mere repair of the street, for the cost of which the city was solely responsible.—City of Covington v. Bullock, Ky., 103 S. W. Rep. 276.

146. MUNICIPAL CORPORATIONS—Vacation of Streets and Alleys.—The common council of a city of the first class has power by ordinance to vacate streets and alleys whenever it deems it necessary.—Blackwell, E. & S. W. Ry. Co. v. Gist, Okla., 90 Pac. Rep. 889.

147. NEGLIGENCE—Dangerous Substances.—Seller of a defective article held not liable for injuries to a person other than the vendee, unless the article is imminently dangerous, or the seller has knowledge of its defects which are such as to endanger life or property without notice of the defect.—Berger v. Standard Oil Co., Ky., 103 S. W. Rep. 245.

148. NEGLIGENCE—Imputed Negligence.—The negligence of the driver of a vehicle contributing to cause a collision with a locomotive held not imputable to his

wife riding by invitation in the vehicle.—Southern Ry. Co. v. King, Ga., 57 S. E. Rep. 687.

149. NEGLIGENCE—Liability.—Where an association gave a street fair and had an amusement company furnish appliances for amusement under a contract for division of fees, held, the association as well as the company was liable for injury through negligence to one riding on an appliance like a merry-go-round.—Hollis v. Kansas City, Mo., Retail Merchants' Ass'n, Mo., 103 S. W. Rep. 82.

150. NOTES—Consideration.—Notes given on the sale of a patent right, where the owner of the patent right failed to comply with Gen. St. 1901, §§ 4356-4358, relating to registration and sale of patent rights, held void as between the parties, and where they have passed to an innocent purchaser the makers may recover from the payee the amount thereof.—Nyhart v. Kubach, Kan., 90 Pac. Rep. 796.

151. NUISANCE—Abatement.—Where odors from fertilizing and tallow plants are the natural cause of the nuisance charged, they constitute a nuisance, though they may not result in driving the plaintiff from his home.—Perrin v. Crescent City Stockyard & Slaughterhouse Co., La., 48 So. Rep. 988.

152. OFFICERS — Compensation.— Public policy and sound morals forbid that a public officer should demand or receive for services performed by him in the discharge of official duty any other remuneration than that prescribed by law.—Somerset Bank v. Edmund, Ohio, 81 N. E. Rep. 641.

153. PLEADING—Conclusion of Law.—An allegation that payment of checks was wrongfully and negligently made states a conclusion of law.—Peerrot v. Mt. Morris Bank, 104 N. Y. Supp. 1045.

154. PLEADING — Tort or Contract.—Where plaintiff alleges a cause of action in tort and another in contract from which only liability in unliquidated damages arose, the amount to be recovered is limited by the amount of the prayer.—Ray v. Southern Ry. Co., S. Car., 57 S. E. Rep. 636.

155. PRINCIPAL AND AGENT—Authority of Agent.—A steward held at most a special agent of a club, and, a debt created by him being outside his authority, the club was not liable therefor.—Reis v. Drug & Chemical Club, 105 N. Y. Supp. 285.

156. PRINCIPAL AND AGENT—Construction of Contract.—An agent contracting on behalf of his principal for the conveyance of real estate held to assume the duties of a trustee of the sum paid by the purchaser to the agent, and the purchaser may hold him therefor.—Martin v. Allen, Mo., 103 S. W. Rep. 135.

157. PRINCIPAL AND AGENT—Extent of Authority.—Persons accepting from an agent a lease of real property for more than three years are bound to ascertain whether he has written authority for executing it.—Clement v. Young-McShea Amusement Co., N. J., 67 Atl. Rep. 82.

158. PRINCIPAL AND AGENT—Ratification.—Though a contract authorizing real estate brokers to sell plaintiff's land was not signed by plaintiff, it was none the less his act, where his wife signed it with his approval.—Tate v. Aitken, Cal., 90 Pac. Rep. 836.

159. PRINCIPAL AND AGENT—Special Agent.—The powers of a special agent are to be strictly construed; he possesses no implied authority beyond what is indispensable to the exercise of the power expressly conferred, and must keep within the limits of his commission.—Bowles v. Tice, Va., 57 S. E. Rep. 575.

160. PRINCIPAL AND AGENT—Written Authority.—One dealing with an agent acting under written authority must take notice of the extent and limits of that authority.—Finch v. Causey, Va., 57 S. E. Rep. 562.

161. PRINCIPAL AND SURETY—Contribution.—The discharge of either the principal or a surety in a bond does not deprive another surety, who subsequently pays of his remedy against the principal for indemnity or the co-surety for contribution.—Lane v. Moon, Tex., 103 S. W. Rep. 211.

162. PRINCIPAL AND SURETY—Payment in Course of Business.—Payments made to a creditor in the current business with the principal will not on the application of a surety be applied to the surety debt.—Exchange Bank of Ft. Valley v. McMillan, S. Car., 57 S. E. Rep. 630.

163. PROPERTY—Title.—The title to tangible property belonging to an Iowa corporation, but stored in New Jersey, is to be determined by the laws of New Jersey as between residents of Iowa and residents of other states.—Schmidt v. Perkins, N. J., 67 Atl. Rep. 77.

164. RAILROADS—Boarding Moving Trains.—One who attempts to board a rapidly moving train does not become a passenger, though he may have a ticket for it.—Illinois Cent. R. Co. v. Cotter, Ky., 103 S. W. Rep. 279.

165. RAILROADS —Injury to Alighting Passenger.—A passenger did not assume the risk of injury by stepping straight out from a car step after the train had started, unless he knew that such method of alighting was dangerous and liable to result in injury —St. Louis Southwestern Ry. Co. of Texas v. Bryant, Tex., 103 S. W. Rep. 237.

166. RAPE—Instructions.—In a prosecution for assault to rape, an instruction requiring the state to show that the defendant laid his hands on prosecutrix with intent to "induce" her thereby to submit against her will to sexual intercourse with an intent to coax prosecutrix to submit to intercourse.—Rahke v. State, Ind., 81 N. E. Rep. 584.

167. REMOVAL OF CAUSES—Dismissal.—A party undertaking the removal to a federal court must take the consequences of the same, and his failure to file a transcript of appeal from the judgment of the state court pending proceedings in the federal court within the time required by statute renders dismissal of the appeal necessary.—Finney v. American Bonding Co., Idaho, 90 Pac. Rep. 859.

168. SALES—Bill of Sale.—A bill of sale held not to contemplate the conveyance of an absolute right of perpetual maintenance of a telephone system where constructed, but only the right which the seller was enjoying at the time of the transfer.—Lattner v. Interstate Telephone Co., Iowa, 112 N. W. Rep. 658.

169. SALES—Questions for Jury.—In an action for breach of a contract, whereby defendant was to deliver to plaintiff certain structural iron according to "complete figured drawings," the question whether the plans furnished constituted such drawings was for the jury.—McNeil v. American Bridge Co., Mass., 81 N. E. Rep. 651.

170. SALES—Rescission.—A seller in a contract for the sale of goods held entitled to exercise his right to rescind the same because of the buyer's failure to pay for installment of goods delivered within the time prescribed.—Ohio Valley Buggy Co. v. Anderson Forging Co., Ind., 81 N. E. Rep. 574.

171. SHIPPING—Care of Passengers.—Failure of the captain of plaintiff's scow to take proper care of her after she had been to G, in violation of the charterer's contract, held admissible in reduction of damages for breach of the contract, though not pleaded.—Bleakley v. Sheridan, 104 N. Y. Supp. 1060.

172. SPECIFIC PERFORMANCE—Parol Modification Not Enforceable.—Neither a parol modification of a contract to convey land ralating to the fencing of a portion thereof, nor defendant's agreement to put the modification agreement in writing, could be specifically enforced.—Rosenberg v. Wilson, 104 N. Y. Supp. 1087.

173. STATES—Action Against.—A defendant in an action by the state may maintain a counterclaim, though an action against the state will not lie for the reason that a citizen cannot sue the state without its consent.—Commonwealth v. Barker, Ky., 103 S. W. Rep. 303.

174. STREET RAILROADS—Malicious Acts of Third Persons.—The malicious act of a boy in placing a brick on a street car track held no answer to the street car company's liability for injuries to a passenger by the derailment of the car, where the motorman could have slackened speed or stopped the car before striking the brick,

but did neither.—O'Gara v. St. Louis Transit Co., Mo., 103 S. W. Rep. 54.

175. STREET RAILROADS—Rights of Pedestrians.—Pedestrians on public thoroughfares traversed by street cars have the right to presume that the street car company will not negligently overload its cars thereby imperilling the safety of travelers by losing control of the cars.—Percell v. Metropolitan St. Ry. Co., Mo., 103 S. W. Rep. 115.

176. STREET RAILROADS—Waiting Room in Store.—The location of ticket office in a passageway leading from a waiting room in a store to an elevated station held not to make the use of the store by passengers private.—Rothschild & Co. v. City of Chicago, Ill., 81 N. E. Rep. 407.

177. TAXATION—Tax Sales.—Where defendants claimed land in controversy under a sale under the abatement act, the tax deed was insufficient to show title, in the absence of independent proof that the land was subject to sale under such act.—Kennedy v. Sanders, Miss., 43 So. Rep. 913.

178. TRESPASS TO TRY TITLE—Purchase of Outstanding Title by Tenant.—Where a tenant in possession purchases an outstanding title, he is bound *bona fide* to give up possession and to continue his action to try title, and recover by the strength of his own title.—McCutchen v. McCutchen, S. Car., 57 S. E. Rep. 678.

179. TRIAL—Duty of Court to Construe Contract.—Where the relations between the parties depended on a written contract unambiguous in its terms, it was the province of the court to construe the instrument, and as a matter of law to determine the relation between the parties.—Veitch v. Jenkins, Va., 57 S. E. Rep. 574.

180. TRIAL — Instruction on Weight of Evidence.—Where plaintiff was injured in attempting to board a street car, it was error to instruct he was entitled to a verdict if the jury believed his testimony; since it required the jury to find defendant negligent if they believed the plaintiff.—Johnston v. New York City Ry. Co., 104 N. Y. Supp. 1039.

181. TRIAL—Objections.—A trial judge should have heard courteous objections, whether he deemed them tenable or not and after refusing to hear them should have signed the bill of exceptions showing that fact.—McLellan v. Brownsville Land & Irrigation Co., Tex., 103 S. W. Rep. 206.

182. TRIAL—Reception of Evidence.—Defendant, having announced that no proofs would be offered on its part, made it proper to permit plaintiff to offer proofs, which during the trial were considered by the court as rebuttal.—Brockmiller v. Industrial Works, Mich., 112 N. W. Rep. 688.

183. TRIAL—Request for Special Findings.—A request for special findings should be made at the commencement of the trial, and, if not then made, the right is waived and thereafter it lies within the discretion of the court whether it will make a special finding or not.—Tevis v. Hammersmith, Ind., 81 N. E. Rep. 614.

184. TRUSTS—Setting Aside Sale by Trustee.—Under the facts, *cestuis que trustent* held not guilty of such laches as to estop them from maintaining their bill to set aside a sale of land made by a trustee under a will with power to sell the same and hold the proceeds in trust for complainants.—Beall v. Dingman, Ill., 81 N. E. Rep. 366.

185. TRUSTS—Tracing Trust Funds.—Where the property of a ward was wrongfully mingled with the individual property of the ward's guardian *de son tort*, so that it could not be traced, the ward was not entitled to priority of payment out of the guardian's estate as against the guardian's general creditors.—Watts v. Newberry, Va., 57 S. E. Rep. 657.

186. USURY—Discounting.—Where a note provides for interest at 8 per cent. only after maturity, it is usury to discount it at 8 per cent.—Merchants' & Planters' Bank v. Sarratt, S. Car., 57 S. E. Rep. 621.

187. VENDOR AND PURCHASER—Bona Fide Purchasers.—A conveyance in trust for the benefit of the grantor does not constitute the grantee a purchaser for value.—Black v. Skinner Mfg. Co., Fla., 43 So. Rep. 919.

188. VENDOR AND PURCHASER—Breach of Contract.—One contracting to purchase a lot described as having a certain frontage held entitled to refuse to complete contract on term of deed showing a smaller frontage.—Floeting v. Horowitz, 104 N. Y. Supp. 1037.

189. VENDOR AND PURCHASER—Fraud by Vendor.—Where the price paid for property was exorbitant, and the purchaser was intoxicated at the time of sale, the burden of proof was upon the vendor to show the good faith of the transaction.—Fagan v. Wiley, Oreg., 90 Pac. Rep. 910.

190. WATERS AND WATER COURSES—Flooding Adjacent Land.—A railroad held liable for the flooding of lands owing to the construction of its roads, irrespective of whether prior diversion of a stream by the landowner had been intended as a permanent one.—Cook v. Seaboard Air Line Ry., Va., 57 S. E. Rep. 564.

191. WATERS AND WATER COURSES—Priorities of Consumer.—That an original irrigation canal was decreed a priority of water right over a continuation thereof, held not to give a consumer from the original canal priority over a consumer from the continuation thereof, who made a prior use of the water.—O'Neil v. Ft. Lyon Canal Co., Colo., 90 Pac. Rep. 849.

192. WILLS—Incapacity.—In proceedings to probate a will, contested on the ground of testamentary incapacity and undue influence, evidence of the financial condition of the children of testator excluded by the will was admissible.—Wallen v. Wallen, Va., 57 S. E. Rep. 596.

193. WILLS—Invalid Provision.—Where a trust and power of sale is created, but the devise is void, the trust and power also fails; but, if the devise is valid in part, the trust and power may be exercised to the extent necessary to carry the valid portion into effect.—Bender v. Paulus, 105 N. Y. Supp. 240.

194. WILLS—When Estates Vest.—Estates arising under a will should be treated as vesting immediately, unless the testator manifested by clear language an opposite intent.—Boston Safe Deposit & Trust Co. v. Blanchard, Mass., 81 N. E. Rep. 654.

195. WITNESSES — Cross-Examination.—The state on cross-examination held entitled to ask witness if he did not tell another witness to say nothing about the affair.—Heinburg v. State, Ala., 43 So. Rep. 959.

196. WITNESSES—Cross-Examination.—A physician testifying for plaintiff in a personal injury action held properly cross-examined with respect to his having been habitually called by plaintiff's attorney, and that his fees had been contingent on the recovery of a judgment for damages.—Horton v. Houston & T. C. Ry. Co., Tex., 103 S. W. Rep. 467.

197. WITNESSES—Examination.—On a trial of a husband for the murder of his wife, the court erred in permitting the prosecution to characterize certain conduct of the husband as ill treatment of his wife.—State v. Blydenburg, Iowa, 112 N. W. Rep. 634.

198. WITNESSES—Examination of Adverse Witness.—In an action against a corporation, the court may permit plaintiff to examine an owner of the corporation called by him in such manner as will elicit the facts, though the examination may amount to a cross-examination of the witness.—North American Restaurant & Oyster House v. McElligott, Ill., 81 N. E. Rep. 388.

199. WITNESSES—Transactions with Decedent.—Under Burns' Ann. St. 1901, § 506, an heir to an estate held not disqualified as a witness in proceedings by the administrators for the appointment of a receiver of one withholding property of the estate.—Sallee v. Soules, Ind., 81 N. E. Rep. 587.

200. WORK AND LABOR — Quantum Meruit. — Where plaintiff furnished plans for a public building under a contract with defendant which was too indefinite for enforcement, plaintiff held entitled to recover on a *quantum meruit* the reasonable value of his services.—Bluemner v. Garvin, 104 N. Y. Supp. 1009.